Supreme Court, U.S.
FILED
AUG 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-256

In the Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE
PETITIONER

v.

A CORPORATION, A PENSION AND WELFARE BENEFIT PLAN, AND AN INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

W. SHERMAN ROGERS
Attorney-At-Law
Arena Tower II, Suite 1040 (B)
7324 Southwest Freeway
Houston, Texas 77074
(713) 271-1748
(202) 686-6436

QUESTIONS PRESENTED

1. Whether the Employee Retirement Income Security Act of 1974, as amended (ERISA), requires full vesting of an employer's contributions to a thrift plan participant's account when the employee-participant has completed four years and ten months (four years and 1,600 hours) of service with the employer and the employer's thrift plan requires five years of credited employment service for full vesting and defines a year of service for vesting purposes as the completion of 1,000 hours in a twelve month computation period.

2. Whether the court of appeals erred as a matter of law in affirming the trial court's summary judgment opinions below which held, contrary to every federal appellate court to have considered the matter of ERISA benefit plan forefeiture, that a participant's benefit entitlement claims could be barred by the doctrine of "unclean hands" or "litigation misconduct" notwithstanding ERISA's non-forfeiture and preemption provisions.

3. Whether the court of appeals erred when it affirmed the trial court's grant of summary judgment against petitioner John Doe when a clear and unequivocal admission adverse to the position of respondent A Benefit Plan -- that it was utilizing the 1,000 hour year of service vesting method -- was before the trial court in the form of a formal ERISA plan description filing.

4. Whether the court of appeals erred when it affirmed the trial court's summary judgment holding that an ERISA covered pension plan which had filed public pension plan documents with the Department of Labor stating that it

was using 1,000 hours to compute a year of service could use another vesting method without complying with ERISA's formal plan amendment requirements and summary plan description disclosure rules.

5. Whether the court of appeals erred as a matter of law in affirming the district court's summary judgment holding that the Department of Labor ERISA regulations, 29 C.F.R. 2520. 104-20 and 29 C.F.R. 2520. 104-21, do not apply to welfare benefit plans with more than 100 employees when those regulations clearly mandate that plans with more than 100 employees are not exempted from compliance with these regulations.

6. Whether the defendants breached their fiduciary duty to participant-employees of the Welfare Benefit Plan by failing to publicly disclose and return, to participant-employees, group insurance policy premium dividends of approximately seven million dollars derived from employee payroll deductions as required by the Department of Labor Regulations, 29 C.F.R. 2520. 104-20 and 29 C.F.R. 2520. 104-21.

7. Whether the employer of a corporate attorney assigned to render professional service to ERISA covered pension and welfare benefit plans can assert an attorney client privilege based on client confidences (1) to suppress the disclosure of ERISA prohibited transactions and fiduciary breaches by the plans' sponsor and the plans' fiduciaries and (2) to prevent compliance with ERISA's provisions.

8. Whether a conflict between a pension or welfare benefit plan restriction or limitation which is not disclosed and illustrated in a sum-

mary plan description must be construed in the light most favorable to the plan participant to prevent a benefit entitlement forfeiture.

9. Whether ERISA mandates that all participants in a pension and welfare benefit plan be treated in a uniform and nondiscriminatory fashion by the fiduciaries of an ERISA covered plan in accordance with its terms and conditions set forth in the plan's summary plan description provisions.

INTERESTED PARTIES

This case is under seal and anonymity has been ordered.

TABLE OF CONTENTS

	Page(s)
Opinions Below	1
Jurisdiction	1
Statutes and Regulations Involved	2
Statement	10
1. Statutory Background	10
2. Statement of the Case	14
A. Doe's Lawsuit #H81-397: The Thrift Plan	14
B. Doe's Lawsuit #H81-396: The Welfare Benefits Lawsuit	16
C. The District Court's Summary Judgment Order of March 30, 1982 and the Fifth Circuit's Partial Reversal in Favor of Plaintiff	17
D. The Parties Contentions On Remand	18
E. The District Court's Orders On Remand	19,
(1) Memorandum and Order Filed December 11, 1984: The Thrift Plan Decision in #H81-397	19
(a) Judicial Estoppel	20
(b) Unclean Hands	21
(i) Plaintiff's Legal Opinions and Letters	21
(ii) Litigation Misconduct	22
(c) The Substantive Law	22
(2) Memorandum and Order Filed June 27, 1985: The Welfare Benefits Decision in #H81-396	23
F. The Court of Appeals Final Judgment On The Merits	24

TABLE OF CONTENTS CONTINUED

Reasons for Granting the Writ	Page(s)
1. The Lower Court's Misapplication, In This Case, Of Treasury Regulations Allowing The Elasped Time Method For Computing A Year Of Service For Vesting Purposes Instead Of The Congressionally Mandated 1000 Hours Rule Is Clearly Inconsistent With The Plain Intent of Congress	25
2. The Lower Court Committed Legal Error In Concluding That Defendant A Corporation's Failure To Amend Its Summary Plan Description Did Not Violate ERISA	29
3. The Lower Court Erred When It Held, Contrary To Every Federal Appellate Court To Have Considered The Matter, That An ERISA Participant's Benefit Entitlement Claims Can Be Forfeited For Reasons Not Related To The Terms And Conditions Of The Plan	30
4. The Lower Corut Committed Legal Error In Reaching Its Holding That Defendants Did Not Breach Their Fiduciary Duty To Doe By Failing To Disclose And Return Group Policy Premium Dividends	32
Conclusion	36
Appendix A.	1a
Appendix B.	3a
Appendix C.	4a
Appendix D.	12a
Appendix E.	24a
Appendix F.	28a
Appendix G.	29a

Page(s)

Adickes v. S.H. Kress & Co.,
398 U.S. 144 (1970) 31

Automated Packaging Systems, Inc. v. I.R.S.,
70 TC 214 (1978) 25, 26, 27, 28

Colonial Refrigerated Transportation Inc. v. Mitchell,
403 F. 2d 541 (5th Cir. 1968) 20

Commissioner v. South Texas Co.,
333 U.S. 496 (1948) 28

Corley v. Hecht Co.,
530 F. Supp 1155 (D.C.D.C. 1982)..... 35

Doe v. A Corporation.,
709 F. 2d 1043 (5th Cir. 1983) 1, 18, 31

Freemont v. McGraw Edison Company,
606 F. 2d (7th Cir. 1979), cert. denied, 445 U.S. 965 (1980)..... 30, 32

Gennamore v. Buffalo Sheet Metals, Inc.,
568 F. Supp. 931 (S.D.N.Y. 1983) 27, 29

Long v. Knox,
291 S.W. 2d 194 (5th Cir. 1956) 21

Markow v. Alcock,
356 F.2d (5th Cir. 1966) 20

Ramirez v. M. David Lowe,
504 F. Supp. 21 (S.D. Tex 1979) 30

Shaw v. Delta Airlines,
463 U.S. 85 (1983) 32

Swaida v. IBM,
570 F. Supp 482 (S.D.N.Y. 1983) Page(s)
aff'd. mem, 728 F. 2d 159
(2 d Cir. 1984) 23, 28

Swint v. Pullman Standard,
456 U.S. 273 (1982) 31

Washington- Baltimore Etc.
v. Washington Star Company,
543 F. Supp 906 (D.C.D.C. 1982)..... 32

Winer v. Edison Brothers Stores
Pension Plan,
593 F. 2d 307 (8th Cir. 1979) 30, 32

STATUTES AND REGULATIONS

Page(s)

Employee Retirement Income Security Act of 1974
[ERISA], as amended,
29 U.S.C. 1001- 1461 2,10
Section 2(b), 29 U.S.C. 1001(b) 2,10,31 36
Section 3(1) and (2),
29 U.S.C. 1002(1) and (2) 10
Section 3(3), 29 U.S.C. 1002(3) 13
Section 3(7), 29 U.S.C. 1002(7) 9
Section 3(16), 29 U.S.C. 1002(16)(B) 8
Section 3(19), 29 U.S.C. 1002(19) 9
Section 3(21),(A), 29 U.S.C. 1002(21)(A)..... 8
Section 3(34), 29 U.S.C. 1002(34) 13
Section 3(35), 29 U.S.C. 1002(35) 12
Section 101, 29 U.S.C. 1021 13
Section 102(a) and (2), 29 U.S.C. 1022(a)(1) .....
and (2) 4, 13, 28, 29, 31
Section 104(a)(1)(C) and (D), 29 U.S.C.
1022(a)(1) (C) and (D) 5, 28
Section 104(b)(1)(A) and (B), 29 U.S.C. 1022
(b)(1) (A) and (B) 28
Section 201(1),29 U.S.C. 1051 13

Page(s)

Section 202(a), 29 U.S.C. 1052(a) 11
Section 203(a)(1), 29 U.S.C. 1053(a)(1) 13, 14, 30
Section 203(b)(2)(A),
29 U.S.C. 1053(b)(2)(A) 2, 13, 14, 18, 25, 27, 30
Section 203(b)(2)(C),
29 U.S.C. 1053(b)(2)(C) 2, 13, 14, 30
Section 203(C)(1)(A) and (B),
29 U.S.C. 1053(C)(1)(A) and (B) ... 6, 14, 30
Section 204, 29 U.S.C. 1054 11
Section 301(a)(8), 29 U.S.C. 1081(a)(8) 12, 13

Section 302, 29 U.S.C. 1082 12
Section 401, 29 U.S.C. 1101 14
Section 404(a)(1)(A),(B) and (D), 29 U.S.C.
1104(a)(1)(A), (B) and (D) 3, 34
Section 406(b), 29 U.S.C. 1106(b) 3
Section 502(a)(1), (2) and (3), 29 U.S.C.
1132(a)(1), (2) and (3) 7, 31
Section 514(a), 29 U.S.C. 1144(a) 7

ERISA Regulations

29 C.F.R. 2520. 104-20 .....9, 17, 24, 33
29 C.F.R. 2520. 104-21 .....9, 17, 24, 33
29 C.F.R. 2520. 102-2(b) 29
29 C.F.R. 2520. 102-3(1) 30

Miscellaneous:

Kroll and Tauber, *Fiduciary Responsibility Under ERISA*, 35 N.Y.U. Inst. on Fed. Tax'n 1059 (1977) 35

Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30, Vand L. Rev. 1 (1977) 35

Page(s)

Annotation: Forfeiture of Pension Plan Benefits As Affected by Employee retirement Income Security Act of 1974, 29 U.S.C. 1001 et seq., 57 ALR Fed 661 31

Employee Benefits Compliance Coordinator Research Institute of America (1986) Vol. 1 Paragraph 1001 at 1,008 and Vol.3 Paragraph 19,401 at 19,405 ..... 12, 33

In the Supreme Court of the United States
October Term, 1986

No. 86-256

JOHN DOE,

PETITIONER

v.

A CORPORATION, A PENSION PLAN AND WELFARE BENEFIT PLAN, AND AN INSURANCE COMPANY

OPNIONS BELOW

The court of appeals' affirmance, without opinion, of the district court's decisions in the consolidated appeals of John Doe, (App. B at 3a) is reported at 788 F.2d 759 (5th Cir. 1986). The opinions of the district court (App. C and D infra, are unpublished.) A previous decision of the court of appeals in this case is published at 709 F2d. 1043 (5th Cir. 1983).

JURISDICTION

The judgment of the court of appeals was entered, without opinion, on April 18, 1986 pursuant to the Fifth Circuit's Local Rule 47.6 (App. B at 3a). A petition for rehearing was denied on May 23, 1986 (App.*A* at 1a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES AND REGULATIONS INVOLVED

Section 2(b) of ERISA,
29 U.S.C. 1001(b), provides:

> **(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries.**
>
> It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

Section 203(b)(2)(A) of ERISA,
29 U.S.C. 1053 (b)(2)(A), provides:

* * * *

> (2)(A) For purposes of this section, except as provided in subparagraph (C), the term "year of service" means a calender year, plan year, or other 12-consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service.

Section 203 (b)(2)(C) of ERISA,
29 U.S.C. 1053 (b)(2) (C), provides:

> In the case of any seasonal industry where the customary period of employment is less

than 1,000 hours during a calendar year, the term "year of service" shall be such period as determined under regulations of the Secretary.

Section 406 of ERISA,
29 U.S.C. 1106(b), provides:
1106. Prohibited Transactions

* * *

(b) Transactions between plan and fiduciary.

A fiduciary with respect to a plan shall not-

(1) deal with the assests of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

Section 404 (a)(1)(A),(B) and (D) of ERISA,
29 U.S.C. 1104 (a)(1)(A), (B) and (D) provides, in part:

(a)(1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character with like aims;

* * *

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

Section 102 (a)(1) and (2) of ERISA, 29 U.S.C. 1022, provides, in part:

Plan description and summary plan description

(a)(1) A summary plan description of any employee benefit plan shall be furnished to participants and beneficiaries as provided in section 1024(b) of this title. The summary plan description shall include the information described in subsection (b) of this section, shall be written in a manner calculated to be understood by the average plan participant, and shall be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations under the plan. A summary of any material modification in the terms of the plan and any change in the information required under subsection (b) of this section shall be written in a manner calculated to be understood by the average plan participant and shall be furnished in accordance with section 1024(b)(1) of this title.

(2) A plan description (containing the information required by subsection (b) of this section) of any employee benefit plan shall be prepared on forms

prescribed by the Secretary, and shall be filed with the Secretary as required by section 1024 (a)(1) of this title. Any material modification in the terms of the plan and any change in the information described in subsection (b) shall be filed in accordance with section 1024(a)(1)(D) of this title.

Section 104(a)(1)(C), (D) and (b)(1)(A) and (B), 29 U.S.C. 1024(a)(1) (C), (D) and (b)(1)(A) and (B) provides, in part:

Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan descripiton, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

* * *

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section: and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modification or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan description, summary plan descriptions, annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

* * * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan.

Publication of the summary plan descriptions and annual reports shall be made to participants of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later within 120 days after the plan becomes subject to this part.

* * * *

Section 203(c)(1)(A) and (B) of ERISA, 29 U.S.C. 1053(c)(1)(A) and (B), provides:

(c) Plan amendments altering vesting schedule.

(1)(A) A plan amendment changing any vesting schedule under the plan shall be treated as not satisfying the requirements of subsection(a)(2) if the nonforfeitable percentage of the accrued benefit derived from employer contributions (determined as of the later of the date such amendment is adopted, or the date such amendment becomes effective) of any employee who is a participant in the plan is less than such nonforfeitable percentage computed under the plan without regard to such amendment.

(B) A plan amendment changing any vesting schedule under the plan shall be treated as

not satisfying the requirements of subsection (a)(2) unless each participant having not less than 5 years of service is permitted to elect, within a reasonable period after adoption of such amendment, to have his nonforfeitable percentage computed under the plan without regard to such amendment.

Section 502(a)(1), (2) and (3) of ERISA, 29 U.S.C. 1132 (a)(1), (2) and (3), provides, in part:

Civil Enforcement

(a) Persons empowered to bring a civil action.

A civil action may be brought—

(1) by a participant or beneficiary-

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fuduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this title or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this title or the terms of the plan;

* * * *

Section 514(a) of ERISA, 29 U.S.C. 1144(a), provides:

(a) Supercedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and

subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003 (b) of this title. This section shall take effect on January 1, 1975.

Section 3(21)(A) of ERISA,
29 U.S.C. 1002(21)(A), provides:

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or discretionary responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Section 3(16) (B) of ERISA,
29 U.S.C. 1002(16)(B), provides:

* * *

(16)(B) The term "plan sponsor" means (i) the employer in the case of an employee benefit plan established or maintained by a single employer, (ii) the employee organization in the case of a plan established or maintained by an employee organization, or (iii) in the case of a plan established or

maintained by two or more employers or jointly by one or more employers and one or more employee organizations, the association, committee, joint board of trustees, or other similar group of representatives of the parties who establish or maintain the plan.

Section 3(7) of ERISA,
29 U.S.C. 1002(7), provides:

(7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.

Section 3(19) of ERISA,
29 U.S.C. 1002 (19), provides:

(19) The term "nonforfeitable" when used with respect to a pension benefit or right means a claim obtained by a participant or his beneficiary to that part of an immediate or deferred benefit under a pension plan which arises from the participant's service, which is unconditional, and which is legally enforceable against the plan. For purposes of this paragraph, a right to an accrued benefit derived from employer contributions shall not be treated as forfeitable merely because the plan contains a provisions described in section 1053(a)(3) of this title.

The Department of Labor Group Insurance pre mium dividend disclosure regulations 29 C.F.R. 2520 104-20 and 29 C.F.R. 2520. 104- 21 are set forth in their entirety in App. G infra, 29a

STATEMENT

1. Statutory Background

The major impetus for the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1001 *et seq.*, was abuse and mismanagement in the private pension system. Employers were taking tax deductions for their contributions to pension plans, but many employees were not receiving the pensions they had been promised. Workers were often denied pensions because they failed to meet rigorous requirements concerning length of service or because their employers went out of business, leaving behind bankrupt pension funds. *See* Section 2(a),(b) and (c) of ERISA, 29 U.S.C. 1001(a) (b) and (c).

The statute is a voluminous, complex, and technical piece of legislation which deals with the establishment, operation and administration of two types of employee benefit plans: welfare plans and pension plans. The term "welfare plan" refers to a wide variety of benefit programs, ranging from medical and hospital care to accident, death, disability and unemployment benefits. *See* Section 3(1) of ERISA, 29 U.S.C. 1002(1). A "pension plan" is a plan which provides retirement income to employees. *See* Section 3(2) of ERISA, 29 U.S.C. 1002(2).

The heart of ERISA is a guarantee to workers that once they: (1) become participants [1] in pension plans (2) begin to accrue [2] rights to promised employer benefits or contributions, and (3) then work some specified

---

[1] With regard to participation in a pension plan, the following rules apply: (1) Employees must be allowed to begin participation in a pension plan after they have reached age 21 and have completed one year of service (which includes at least 1,000 hours of work). The service requirement can be three years instead of one if the employee is 100 percent vested after the three years. (2) Employees cannot be excluded from a pension plan on the grounds that they are too old unless they begin their employment with the company concerned within five years of the normal retirement age of certain pension plans (defined benefit plans). *See* Section 202(a) of ERISA, 29 U.S.C. 1052(a).

[2] In a defined benefit pension plan, once becoming a participant, an employee begins accruing a specific amount of money each year toward a monthly retirement benefit. The amount accrued each year is based on a formula generally applied to salary and years of service, such as percentage of final or average pay times number of years of service. An employee has no legal right to the accruals, however, until vested. The accrual schedule must follow minimum standards imposed by ERISA. Pension plans are not required to accrue benefits for an employee for any year in which the employee has less than a year of service. If an employee works less than full time, but still works enough hours to be credited with a year of service, he or she must be given credit for a ratable portion of the benefit that would have been earned at full-time work. *See* Section 204 of ERISA, 29 U.S.C. 1054.

minimum period, they will have earned a right to a pension at retirement. This goal is reached through "vesting", that is, the earning by employees of nonforfeitable rights to either defined pension benefits[3] or defined pension contributions[4] promised by the employer upon completing some minimum period of service.

---

[3] Pension plans are divided into two broad categories: defined benefit and defined contribution plans. A defined benefit pension plan promises a fixed monthly benefit upon retirement. ERISA does not specify a formula to be used or what the benefit levels should be, but it does require employers to contribute enough money each year to cover the benefits which employees have accrued that year. Employer contributions are determined actuarially on the basis of benefits payable, mortality, workforce turnover and other factors. Employers often use a combination of length of service (years worked) and amount of earnings to establish what the benefits will be. Alternatively, the benefit could be a flat amount per month regardless of the earnings or service of the employee, or a formula might be used which sets the benefit at a certain percentage of compensation or a percentage of compensation times years of service. The earnings used might be a career average or a "final" pay formula which uses a stated number of years at the end of the employee's career. *See* Section 3(35) of ERISA, 29 U.S.C. 1002 (35). *See also* Sections 301 and 302 of ERISA, 29 U.S.C. 1081 and 1082. *See generally*, 1 *Employee Benefits Compliance Coordinator*, Paragraph 1000 at 1,008 (Research Institute of America 1986).

[4] A defined contribution plan, also known as an "individual account plan," provides for a separate account for each participant to which contributions are made by the employer under a specified formula, for example, a percentage of the employee's earnings. These payments accumulate, along with investment earnings, in the employee's account. The retirement benefit depends on the contributions made to the individual's account, investment

ERISA requires that an employee participant be credited with a year of service for vesting purposes for any twelve month period during which he or she has 1,000 hours of service although a lesser number of hours is allowed in certain circumstances. *See* Sections 203(b)(2)(A) and (C) of ERISA, 29 U.S.C. 1053 (b)(2)(A) and (C). However, contributions made by employee-participants themselves to their pension plans are always vested. *See* Sections 203(a)(1) of ERISA, 29 U.S.C. 1053(a)(1).

Welfare benefit plans are not subject to the foregoing requirements of participation, accrual, and vesting. *See* Sections 201(1), 203 and 204 of ERISA, 29 U.S.C. 1051(1), 1053 and 1054. However, welfare benefit plans are subject, like pension plans, to ERISA's reporting, disclosure, and fiduciary requirements. *See* Sections 3(3), 101 and 401 of ERISA, 29 U.S.C. 1002(3), 1021 and 1101. Employees, under the Act, must be furnished with understandable and accurate summaries of employee benefit plans. Furthermore, the persons who control and manage employee benefit plans — i.e., the fiduciaries — must exercise there duties in a prudent manner, solely for the benefit of participants and beneficiaries. *See* Sections 102(a)(1), 404(a)(1) and 406(b) of ERISA, 29 U.S.C. 1022(a)(1), 1104(a)(1), and 1106(b).

---

gains and losses, the plan experiences and income realized and expenses incurred by the plan. (All defined contribution plans are exempt from ERISA'S funding requirements and are not covered by plan termination insurance). Also included under the term "defined contribution" plan are profit sharing, thrift, stock bonus and employee stock ownership plans. *See* Section 3(34) of ERISA, 29 U.S.C. 1002(34). *See also* Section 301(a)(8) of ERISA, 29 U.S.C. 1081(a)(8).

2. Statement of the Case

During February, 1981, petitioner John Doe filed two suits alleging causes of action for pension and welfare benefit plan entitlements based on breaches of ERISA and other claims after exhausting his benefit plan appeal remedies. In both cases, Doe had federal question standing to sue as an affected plan participant, based on his employment with A Corporation from May of 1975 through March 1980 and his participation in the pension and welfare benefit plans. Federal jurisdiction to hear such lawsuits is expressly provided by ERISA. *See* ERISA Section 502(e)(1), 29 U.S.C. 1132(e)(1).

A. Doe's Lawsuit #H81-397: The Thrift Plan

Petitioner John Doe alleged in lawsuit H81-397 that defendant A Corporation had violated ERISA by failing to use ERISA's 1,000 hour year of service vesting rule, 29 U.S.C. 1053(b) (2) (A), to compute benefit entitlements thereby resulting in benefit forfeitures to his detriment. Petitioner Doe filed this lawsuit after a lengthy benefit plan administrative appeal process had been exhausted with the plan fiduciaries. The plan fiduciaries rejected Doe's demand that they comply with the law (ERISA), the terms of the plan, and with their clear statement in the Summary Plan Description filed with the Department of Labor that the Thrift Plan was using the 1,000 hour year of service vesting computation method. (App. E at 26a question 21(b) response).

As a participant in the Thrift Plan of the A Benefit Plan,[5] Doe contributed money from his

[5] The Thrift Plan is a defined contribution pension plan within the meaning of ERISA.

salary to the Thrift Plan for the purchase of A Corporation common stock and the employer, defendant A Corporation, matched dollar for dollar the plaintiff's contributions to the Thrift Plan. The matching employer contributions were also used to purchase A Corporation stock which was credited to plaintiff's Thrift Plan Account. (App. F at 28a). All of the A Corporation's common stock in the plaintiff's Thrift Plan account were held in the name of the Thrift Trustee. (App. F at 28a). The Thrift Plan provides for full vesting of the employer's matching contributions if a Thrift Plan participant has five (5) or more "years of credited employment service" at the time a participant terminates his or her employment with A Company. (App. F at 28a).

ERISA Section 203(b)(2)(A), 29 U.S.C. 1053 (b)(2)(A), defines the statutory minimum vesting standard "year of service" for employee benefit plans covered by ERISA as:

> ". . . a calendar year, plan year or other 12 consecutive month period designated by the plan (and not prohibited under regulations prescribed by the Secretary) during which the participant has completed 1,000 hours of service."

As required by ERISA, the A Benefit Plan uses the anniversary of an employee's employment commencement date to compute years of service for vesting of benefits in the Thrift Plan and Annuity Plan. (App. E at 26a question 21(a)(v) response). Petitioner John Doe, as an A Corporation employee, completed four years of service and more than 1,600 hours of service within the last twelve month computation period computed from his fourth anniversary date.

Since Doe worked more than 1,000 hours between the time period of May 29, 1979 and March 31, 1980, he petitioned his employer defendant A Corporation and the Benefit Plan Committee for the Thrift Plan for a fifth year of service credit in order to vest his employer's contributions to his Thrift Plan account. (App. E at 25a, question 19(a)(viii) response).

As a result of denying plaintiff's benefit entitlement claim, the employer contributions to plaintiff's Thrift Plan account were classified as unvested by the Thrift Trust. Soon thereafter, shares of A Corporation common stock in plaintiff's Thrift Plan account were sold in order to return the employer contributions in Doe's account to defendant A Corporation. (App. F at 28a). As a result, Doe filed lawsuit H81-397 alleging violations of ERISA and the U.S. securities laws.

B. Doe's Lawsuit #396:
The Welfare Benefits Law Suit

In the other lawsuit Doe asserted that there was an ERISA fiduciary duty on the part of defendants to disclose and return group insurance policy premium dividends (refunds) which were derived from payroll deduction contributory group life insurance premium payments made by plan participants, such as himself. Doe contended that the failure to do so would constitute an ongoing equitable fraud, an ERISA fiduciary breach and an ERISA prohibited transaction in violation of the civil and criminal provisions of ERISA (App. C at 6-7a). The insurance policy premium dividends referred to by Doe were publicly disclosed by the plan fuduciaries to the Department of Labor in public documents, but not to plan participants.

Doe alleged further that defendant A Corpora-

tion's failure to refund these surplus group insurance dividends also violated the explicit terms of the applicable Department of Labor Regulations, 29 C.F.R. 2520.104-20 and 29 C.F.R. 2520. 104-21, which mandate the disclosure of group insurance premium dividends to plan participants and the prompt refund of group insurance premium dividends, on a prorata basis, to the contributing plan participants. (App. C at 6-7a).

Lawsuit H81-396 also contained a cause of action that alleged a violation of ERISA's summary plan description disclosure provisions in that he was denied the right to convert his group term life insurance policy into an individual term life insurance policy. Doe contended that the post ERISA summary plan description concerning the insurance policy, that was in force at the time of Doe's employment termination, failed to disclose that there were limitations on the conversion right. (App. C at 4-5a).

C. The District Court's Summary Judgment Order of March 30, 1982 and The Fifth Circuit's Partial Reversal In Favor of Plaintiff.

Respondent A Corporation filed a motion to dismiss Doe's lawsuit on the ground that Doe was barred from initiating a class action suit or even an individual suit because its prosecution would result in his violating the attorney client privilege by the disclosure of confidential information. Treating the motion as one for summary judgment, the district court granted the motion holding that Doe was disqualified to sue either A Corporation or A Benefit Plan because they were his former clients. On appeal, the Fifth Circuit reversed and remanded, in part, holding that Doe was barred from prosecuting the action as

class representative of other employees but that he could prosecute the action in his own behalf. *Doe v. A. Corp.*, 709 F. 2d 1043, 1045, 1048-51 (5th Cir. 1983).

D. The Parties' Contentions on Remand.

On remand in case H81-397, both parties ultimately filed motions for summary judgment on the merits of the case. Plaintiff Doe contended, among other things, in his motion for summary judgment, that he was entitled to the contributions made by defendant A Corporation to the Thrift Account maintained on his behalf while he was employed as an attorney for defendants. Specifically, Doe argued that ERISA required that he be credited for a fifth year of vesting service because he worked 1,000 hours in that year even though he did not work twelve months in that year (App. E at 25a and 26a). In this regard, Doe noted that the clear language of ERISA requires that all benefit plan participants be given credit for one year of service for vesting purposes once they have completed 1,000 hours of service and that any administrative regulation which authorizes a different method of counting service is unlawful. *See* ERISA section 203(b)(2)(A), 29 U.S.C. 1053(b)(2)(A). Doe also argued that respondent A Corporation had represented to the government that it would be using the 1,000 hour method for vesting purposes on an EBS-1 Plan Description form required to be filed with the Labor Department. (App. E at 26a question 21(b) response).

Defendant A Corporation, on the other hand, contended, *inter alia*, that ERISA did not absolutely mandate the use of the 1,000-hour method

to calculate vesting periods and defended the validity of Treasury regulations promulgated in 1980 which expressly permit plans to calculate vesting service by calendar years regardless of the number of hours actually worked. Further, the Defendant's filed an affidavit stating that the EBS-1 plan description formal filing was a mistake. (App. D at 21a).

With respect to cause H81-396, Doe continued to assert that the defendants had breached their fiduciary duty to the plan participants of its Welfare Benefit Plan when they permitted the embezzlement of plan assets (group dividends) which belonged to participants like himself. The defendants countered by offering to pay Doe all of the premiums which had been deducted while he was a plan participant (App. C at 7a). Doe's counter offer to the defendant's settlement proposal was that he would accept it on the condition that his counsel's attorney fees be paid, and that the defendants agree in writing to voluntarily comply with the Department of Labor Regulations, and make restitution to all other affected plan participants. The defendants rejected this counter offer to settle this matter and then filed a summary judgment motion based on Doe's alleged unclean hands and mootness. The mootness argument was based solely on defendants, settlement proposal offer. (App. C at 8a).

E. The District Court's Orders On Remand.

(1.) Memorandum And Order Filed December 11, 1984: The Thrift Plan Decision in H81-397

On December 11, 1984, the district court filed its "Memorandum And Order" -- signed and dated on December 10, 1984 -- granting the motion of defendant A Corporation for summary judgment. (App. D at 12a).

In granting the motion of defendant A Corporation for summary judgment, the district court held that plaintiff Doe's claims were "foreclosed by the [doctrine of] judicial estoppel" and "barred by the doctrine of unclean hands." Finally. the court held that even "[a]ssuming *arguendo* that Plaintiff's claims are not barred by judicial estoppel or unclean hands, Plaintiff's claims must fail because of the pertinent substantive law." (App. D at 15a).

(a). *Judicial Estoppel.* In holding that the plaintiff John Doe's claims were barred by the doctrine of judicial estoppel, the district court first noted that the doctrine "is intended to protect the integrity of judicial proceedings" and "forecloses a litigant from making assertions or legal claims in one judicial proceeding that are inconsistent with sworn statement made in a prior proceeding..." (App. D at 13a). The district court then noted that Doe had testified in his July 1984 deposition that he had become entitled to contributions made by A Corporation to his Thrift Fund account no later than November 1979; but that Doe had thereafter, on December 6, 1979, filed an inventory in his divorce proceeding that the stock in the Thrift Fund purchased with A Corporations's contributions was a non-vested asset. (App. D at 14a). The district court acknowledged that the Fifth Circuit has stated, in at least two opinions,[6] that the judicial estoppel doctrine could "not be invoked by non-party to the prior proceeding," but dismissed these rulings as "dicta." (App. D at 13a).

---

[6] *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F. 2d 541 (5th Cir. 1968); *Markow v. Alcock*, 356 F.2d 194 (5th Cir. 1966).

Thus relying on other authorities, including decisional law of the Texas State court system,[7] the federal district court held that"[t]he party invoking judicial estoppel need not have been a party to the prior litigation." (App. D at 13a).

(b.) *Unclean Hands*

(i) *Plaintiff's Legal Opinions and Letters.*

In holding that plaintiff Doe's claims were also barred by the doctrine of unclean hands, the district court agreed with defendant A Corporation's contention that plaintiff had rendered legal opinions and letters, when employed as an attorney by defendant A Corporation, to the effect that the Corporation's Thrift Fund was in compliance with applicable laws.

Specifically, the district court held (1) that plaintiff had conceded in his deposition[8] that at the time he wrote one of his opinions for defendant A Corporation, he had stated that the Plan was properly administered in accordance with the elapsed time regulations he was now challenging; and (2) that the plaintiff, while employed as an attorney for defendant A Corporation had responded to a formal inquiry regarding the use of the 1,000-hour Plan by stating that a full year in service was required for participation[9]. (App. D at 15a).

---

[7] *Long v. Knox* 291 S.W.2d 292 (Tex. 1956).

[8] It must be noted that Doe's deposition was never completed and his counsel was never given an opportunity to question him, because the trial court cut off discovery in this case.

[9] It should be noted that the issue before the court in this case is use of the 1,000 hour year of service rule for purposes of vesting and not participation.

(ii) *Litigation Misconduct.* As a second ground for holding that plaintiff Doe's claims were barred by the doctrine of unclean hands, the district court agreed with defendant A Corporation's assertion that plaintiff had engaged in litigation misconduct. In this regard, the district court found that the plaintiff had engaged in litigation misconduct by: (1) persisting in urging the class elements of his law suit despite the Fifth Circuit's prohibition of his maintaining a class action; and (2) by attempting to pursue discovery of information pertinent only to the purported claims of others. (App. D at 16a).

(c) *The Substantive Law.* The district court held that even if plaintiff Doe's claims were not barred by the doctrines of judicial estoppel and unclean hands, his claims would fail under the applicable substantive law. The court noted that the "gist of Plaintiff's contentions on the merits of his claims was that (1) ERISA requires that all benefit plan participants be given credit for one year of service for vesting purposes once they have completed 1,000 hours of service; and (2) any administrative regulation which authorizes a different method of counting service vis-a-vis vesting is unlawful. (App. D at 18a).

In finding plaintiff's contentions "ill-founded" (App. D at 18a), the district court relied not on the words of the statute but on a 1980 Treasury alternative vesting computation regulation "which expressly permit[s] plans to calculate vesting service by calendar years, regardless of the number of hours actually worked. *See* App. D at 19a citing 45 Fed. Reg.48. 980 (1980); 26 C.F.R. 1.410(a)-7(a) (ii) (1982); and 26 C.F.R. 1.411(a)-5(b) (2), 1.411(a)-6(c) (2) (1982). The district court then noted that defendant A Corporation's Thrift Plan provided that an employee had a vested

right to 100% of the Corporations's contributions to the Thrift Account after the employee had completed five (5) years of credited vesting service; but that plaintiff had voluntarily left A Corporation's employ several months before completing his fifth year of service. (App. D at 20a). In the court's view, defendant A Corporation's Thrift Plan "satisfie[d] both the literal wording and the intent of Section 203" of ERISA. (App. D at 20a). Furthermore, the district court noted that contentions virtually identical to those urged by plaintiff were rejected in *Swaida v I.B.M. Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd mem.*, 728 F.2d 159 (2d Cir. 1984). Accordingly, the district court adopted the reasoning and holding of *Swaida*.

Finally the district court addressed plaintiff Doe's contention that the plan at some point used the 1,000-hour method of counting service for vesting purposes. The court first acknowledged that the Plan had in fact formally filed a plan description Form EBS-1 in June 1976 indicating that it would be utilizing the 1,000 hour vesting computation method. However, the court dismissed this filing as "simply a 'red herring' since it was filed very early on in the administration of ERISA, at a time when it was not known whether the regulations would be promulgated so as to require use of the 1,000-hour method." (*See* App. D at 21a).

(2.) Memorandum And Order Filed June 27, 1985: The Welfare Benefits Decision in #H81-396.

On June 27, 1985, the district court filed its Memorandum and Order granting the motion of defendant A Corporation for summary judgment with respect to the Welfare Benefit Plan.

The district court held, as a matter of substantive ERISA law, that the Department of Labor regulations, 29 C.F.R. 2520.104-20 and 2520. 104-21, did not apply to benefit plans with more than one hundred (100) employees despite the fact that these regulations only exempt small plans with less than one hundred plan participants and not large plans like the A Benefit Plan which had more than one hundred plan participants. The trial court then held that Doe had no right to seek the equitable accounting and ERISA enforcement relief he sought in his amended complaint because of his "unclean hands." Accordingly, defendant A Corporation was not required to disclose to the employee-participants the existence of $6,957,225 in premium dividends (refunds) derived from payroll deduction contributory life insurance premium payments made by plan participants nor to distribute these refunds to plan participants on a pro-rata basis. The district court also held that the defendants offer to return Doe's contributions to the plan mooted his claim for compensatory damages (App. C at 7a-8a).

Finally, the district court held that the pre-ERISA (1974) summary plan description furnished Doe stated 'that no medical examination was required and that a departing employee could obtain any available form of insurance except term insurance" and that Doe as a former pension counsel had potential knowledge of this limitation that existed in the group insurance contract but not in the post-ERISA (1976) amended summary plan description.

F. *The Court of Appeals Final Judgment On The Merits*

On April 18, 1986, the court of appeals entered,

without opinion, pursuant to Local Rule 47.6, its final judgment affirming the opinions of the district court in Doe's consolidated appeals.(App. B at 3a). Mr. Doe's petition for rehearing was denied on May 23, 1986 (App. A at 1a).

REASONS FOR GRANTING WRIT

1. The Lower Court's Misapplication, In This Case, Of Treasury Regulations Allowing The Elapsed Time Method For Computing A Year Of Service For Vesting Purposes Instead Of The Congressionally Mandated 1000 Hour Rule Is Clearly Inconsistent With The Plain Intent Of Congress.

In *Automated Packaging Systems, Inc. v. Commissioner of Internal Revenue*, 70 TC 214 (1978), the Tax Court analyzed the legislative history of ERISA's 1000 hour year of service vesting computation method.[10] The Tax Court unequivocally held, in view of the legislative history, that "Congress intended the term 'year of service' to mean that an employee (participant) who has completed 1000 hours of service during a 12-month computation period *must* be given credit for one year of service for purposes of vesting," *id.* at 220 (emphasis added), even though determining "the number of hours of service attributable to an employee during the computation period may be cumbersome to the administration of the plan." *Id.* at 221-222. The Tax Court flatly stated that "[as] long as an employee performs 1,00 hours of service during a computaion period, vesting credit is required." *Id.* at 224.

[10] ERISA's 1,000 hour vesting computation rule, Section 203(b)(2)(A), 29 U.S.C. 1053 (b)(2)(A), was added to the Internal Revenue Code, as amended,at 26 U.S.C. 411(a)(5)(A).

In *Automated Packaging Sustems, Inc. v. Commissioner*, 70 TC at 224, the United States Tax Court viewed the elapsed time method, when used in a legitimate manner, as providing "a more liberal procedure for computing vesting credit" and, to that extent only, to be consistent with congressional intent. In this context, the court noted that:

> Under the elasped time method a year of service is generally measured by determining the total "period of time" an employee is employed regardless of the actual number of hours of service completed during a computation peirod. Therefore, this method of computation is more favorable to employees and less costly to administer because the plan is required only to keep records of appropriate periods of time. As a result, an employee may be provided with a single reference point for determining his or her rights under plans which rely on length of service for determining vesting rights.

Id. at 222, *citing* 29 Fed. Reg. 56469 (1976). In the Tax Court's view, the "elapsed time method as an *alternative* method. . . promulgated by the Secretary of Labor"[11] was acceptable since it "afford[ed] employees participating under a pension plan a more workable reference point from which to determine their accumulated, credit in terms of vesting." However, the Tax Court made clear that ERISA "does not require employment for 12 consecutive months in order (for an employee-participant) to acquire a 'year of ser-

[11] Such regulations were originally issued by the Department of Labor in the form of temporary and proposed regulations. Under sec. 101 of the Reorganization Plan No. 4 of 1978, 43 F.R. 47713 (Oct. 1978), jurisdiction over this subject was transferred to the Treasury Department. Consequently, the final regulations were issued by the Treasury Department, and not the Department of Labor, on June 17, 1980 (T.D. 7703, 1980-2 C.B. 143.)

vice' credit for vesting purposes." *Id.* at 224. The Tax Court made clear that a vesting requirement more restrictive than ERISA's 1,000 hour vesting computation method would run aflul of the clear congressional intent in enacting the 1,000 hour vesting rule. *Id.* at 220-221 and 224.

Accordingly, the district court's conclusion, affirmed without opinion by the court of appeals, that "ERISA does not absolutely mandate the use of the 1,000-hour method to calculate vesting periods" is erroneous to the extent that the court read the elapsed time regulations as permissibly mandating that a plan participant work twelve months in order to receive one year of service for vesting purposes. The legislative history of ERISA fully supports petitioner Doe's position that the "1,000 hours of service" requirement set forth in section 203(b)(2)(A) of ERISA, 29 U.S.C. 1053(b)(2)(A), is the only permissible measuring factor to be considered when computing a year of service credit for vesting purposes for employees whose service is not seasonal or intermittent. *See Automated Packaging, supra*, 70 TC at 220.[12] It is equally clear that a vesting method more restrictive than the 1,000 hour method finds no support in either the language of the statute or the legislative history. *Id.* at 220-221 and 224. *See also Gennamore v. Buffalo Sheet Metals, Inc.*, 568 F.Supp. 931 (S.D.N.Y. 1983) (Employee accrued requisite ten years needed to vest his pension under plan, as amended, even though under amended plan

---

[12] It is clear that the issue before this Court does not involve the question of seasonal or part-time workers. *Compare with Automated Packaging v. Commissioner, 70 TC 214, 220 n.6.*

employee's tenth year of service was only ten months long since employee worked more than 1,000 hours during final period).

Treasury regulations must be sustained unless unreasonable and plainly inconsistent with the revenue statutes. *Commissioner v. South Texas Co.*, 333 U.S. 496, 501 (1948). Here, there can be little doubt that the regulations, as applied, are clearly inconsistent with the intent of Congress. For this reason, the lower court should have rejected the holding of the Second Circuit in *Swaida v. IBM*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd mem.*, 728 F.2d 159 (2d Cir. 1984) (Treasury Department regulations may validly require that an employee work a full twelve months in order to receive one year of service for vesting purposes.)[13]

In summary, ERISA requires, as the Tax Court correctly held in *Automated Packaging*, that an employee who has completed 1,000 hours of employment service in a vesting computation period (12 months) must be given one "year of service" for purposes of pension plan vesting.

---

[13] ERISA mandates that pension vesting rules cannot be changed informally as defendant A Corporation contended and the court below held. *See* Sections 102(a)(1) and (2), 104(a)(1)(D), 104(b)(1)(A) and (B) of ERISA, 29 U.S.C. 1022(a)(1) and (2), 1024(a)(1)(D) and 1024(b)(1)(A) and (B). Even *Swaida* clearly stated that IBM had formally amended its plan to utilize the elapsed time vesting computation method. *See* 570 F.Supp. at 484. In this case, the Thrift Plan was not formally amended by defendant A Corporation as the IBM pension plan was in the *Swaida* case.

Simply put, this means that even where a pension plan has been formally amended to utilize the elapsed time vesting computation method -- which is not the case here -- an employee like petitioner Doe must receive a "year of vesting service"for his last twelve month computation period in which he has worked in excess of 1,000 hours. *See generally Gennamore v. Buffalo Sheet Metals*, 568 F. Supp 931 (S.D.N.Y. 1983).

2. The Lower Court Committed Legal Error In Concluding That Defendant A Corporation's Failure To Amend Its Summary Plan Description Did Not Violate ERISA And The Plaintiff's Benefit Entitlement Rights

Defendant A Corporation's failure to amend its Thrift Plan along with its Summary Plan description to reflect that it was no longer using the 1,000 hour rule was itself a violation of ERISA. Section 102(a)(1) of ERISA, 29 U.S.C. 1022(a)(1)(1982), states in substance that a summary plan description be furnished to plan participants and beneficiaries and that it be written in a manner calculated to be understood by the average plan participant. Inasmuch as the statute requires that the plan description "be sufficiently accurate and comprehensive to reasonably apprise such participants and beneficiaries of their rights and obligations" under it, the regulations promulgated by the Department of Labor further focus upon these requirements by noting that the summary plan description "must not have the effect [of] misleading, misinforming or failing to inform participants and beneficiaries." 29 C.F.R. 2520. 102-2(b) (1983). The same regulations also provide that any limitation on plan benefits shall not be "otherwise made to appear unimportant," *id.*, and that the plan description have "a statement clearly identifying circumstances which may result in disqualifica-

tion, ineligibility, or denial, loss, forfeiture or suspension of any benefits that a participant or beneficiary might otherwise reasonably expect the plan to provide. . . ."29 C.F.R. 2520.102-3(1) (1983). Because the defendant did not comply with this provision, the lower courts should not have granted summary judgments in favor of defendants.

3. The Lower Court Erred When It Held, Contrary To Every Federal Appellate Court To Have Considered The Matter, That An ERISA Participant's Benefit Entitlement Claims Can Be Forfeited For Reasons Not Related To The Terms And Conditions Of The Plan.

The fundamental legal error in both of the lower court's opinions below, which were affirmed without opinion by the Fifth Circuit panel, lies in the repeated holding that a plan participant's ERISA benefit entitlement claims can be barred for reasons of "litigation misconduct" or "unclean hands". This holding, that a plan participant's ERISA rights can be limited or barred for reasons not related to the terms and conditions of an ERISA covered benefit plan is in direct conflict with ERISA's nonforfeiture provision set forth in 29 U.S.C. 1053 and the applicable federal case law on this topic. *See Freemont v. McGraw Edison Company*, 606 F. 2d 752 (7th Cir. 1979), *cert. denied*, 445 U.S. 965 (1980) (ERISA Section 203, 29 U.S.C. 1053, prohibits any forfeiture of employee benefit rights after January 1, 1976 even though an employee stole property from an employer); *Winer v. Edison Brothers Stores Pension Plan*, 593 F.2d 307 (8th Cir. 1979) (ERISA bars the enforcement of "bad boy" clauses after its effective date notwithstanding the alleged misconduct on the part of the employee). *See Ramirez v. M. David Lowe*, 504 F.Supp. 21 (S.D. Tex. 1979) (court held that defendant could not divest Plaintiff of his

thirty-five percent vested benefit based on "bad boy" provison in plan after employee violated post employment non-competition provision). *See also* Annotation: *Forfeiture of Pension Plan Benefits as Affected by Employee Retirement Income Security Act, 29 U.S.C. 1001 et. seq.*, 57 ALR Fed 661.

If a blatant theft against an employer is not a permissible offset against a plan participant's ERISA rights and benefit entitlements or a basis to bar a plan participant's ERISA claims, then *a fortiori, the alleged* unclean hands of Petitioner Doe also cannot constitute a permissible bar to his ERISA rights and benefit entitlements. Furthermore, these alleged "unclean hands" actions on the part of petitioner are disputed factual issues which were not appropriate for summary judgment. *See generally, Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-161 (1970).[14] Moreover, Congress' primary policy reason for enacting ERISA was to allow plan participants,like Doe, to protect their interest by having "ready access to the Federal Courts". *See* ERISA Sections 2(b) and 502(a)(1), (2) and (3), 29 U.S.C. 1001(b) and 1132(a)(1),(2) and (3). However, it is fairly clear from the lower court's opinions in this case that the court believed that Doe, as a former attorney for A Corporation, should not be entitled to protect or pursue his individual rights as a plan participant after Doe had been denied

---

[14] The Court of Appeals for the Fifth Circuit in *Doe v. A Corporation*, 709 F. 2d 1043, 1048 (5th Cir. 1983) made a factual finding that Doe was not an ERISA fiduciary without any factual finding at the district court level. The district court on remand merely relied on the court of appeals' determination. (App. C at 6a). This is a pure question of fact not a legal question. *Cf. Swint v. Pullman Standard* 456 U.S. 273, 286-292 (1982).

class representative status. This view is based on the concept that Doe's pursuit of his individual rights adversely affected the interest of Doe's former employer, defendant A Corporation, and Doe's former client, defendant A Benefit Plan, and that Doe would not be able to bring these actions but for his knowledge of client confidences of wrong doing concerning the pension and welfare benefit plans. The problem with the lower court's legal analysis is that it ignores the fundamental rule of ERISA enunciated in the case of *Washington-Baltimore Etc. v. Washington Star Company*, 543 F. Supp. 906, 909 (D.C.D.C. 1982), that the real client of an attorney who advises an ERISA fiduciary about a matter dealing with the administration of an employee benefit plan is not the plan sponsor or the plan fiduciaries but the plan participants.

To the extent that the lower court relied on state law concerns about Doe's alleged conduct, those concerns are clearly preempted by ERISA. *See generally Shaw v. Delta Airlines*, 463 U.S. 85, 95-100 (1983). The decision in this case has placed the Fifth Circuit in direct conflict with established ERISA federal case law on the subject, among other things, of benefit entitlement forfeiture enunciated in the Seventh Circuit's *Fremont* decision and the Eighth Circuit's *Winer* decision. This is a significant legal issue which warrants attention by the Supreme Court.

4. The Lower Court Committed Legal Error In Reaching Its Holding That Defendants Did Not Breach Their Fiduciary Duty To Petitioner Doe By Failing To Disclose And Return Group Policy Premium Dividends

The Applicable ERISA regulations [15] concerning group insurance premium dividends or surpluses derived from plan participant payroll deductions require a group welfare plan, like the one in this case, which has more than one hundred employees, to:

1. disclose in writing in the summary plan description the group insurance plan provisions concerning the allocation of group insurance premium dividends or refunds; and

2. refund on a prorata basis the group insurance premium dividends after they are received from the insurance company to the contributing plan participants.

In this case the trial court held that the regulations do not apply to plans with more than 100 plan participants when, in fact, just the opposite is true. Furthermore, the court held, in effect, that Doe's alleged "unclean hands" atoned for the plan's breach of its obligations under the law. This is flagrant error.

Defendant A Corporation's admitted failure to refund surplus group insurance dividends violate the explicit terms of the applicable Department of Labor Regulations, 29 C.F.R. 2520. 140-20 and 29 C.F.R. 2520. 140-21, which require the disclosure of group insurance premium dividends on

---

[15] See Department of Labor ERISA Regulations, 29 C.F.R. 2520. 104-20 and 29 C.F.R. 2520. 104-21 and 3 *Employee Benefits Compliance Coordinator*, paragraph 19,405 and 19,401 (Research Institute of America 1986).

a prorata basis to contributing participants.[16] Moreover, if the lower court had been more diligent, it would have clearly seen in the text as well as in the illustrative examples within these regulations that only small plans with less than one hundred plan participants were exempted, and not large plans like the A Benefit Plan which the district court noted had more than one hundred plan participants during the years 1975 through 1980. (App. G. at 29a).

Congress, in addition to requiring that a fiduciary administer a plan solely in the interest of the participants and beneficiaries, provided that a trustee was to discharge his duties with respect to the plan with the care, skill, prudence and diligence that a prudent man would use. *See* Section 404(a)(1)(B) of ERISA, 29 U.S.C. 1104(a)(1)(B). This charge imposes an unwavering duty on an ERISA trustee to make decisions with single-minded devotion to the interests of the plan's participants and beneficiaries and, in so doing, to act as a prudent person would act in a similar situation. It is these familiar principles evolved from the common law of trusts, that Congress codified and made applicable to ERISA trustees. *See* H.R.Rep. No. 533, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 4649; S.Rep. No. 127, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S. Code Cong. & Ad.

---

[16] It is an undisputed fact in this case that The Annual Return Report on Form 5500, filed by the defendant A Benefit Plan with the Department of Labor for the years 1975 through 1980 showed a total of $6,957.225 in group insurance premium dividends (refunds) derived from payroll deduction payments by plan participants that were not returned to the plan participants as the law requires. (App. C at 7a).

News 4838, 4864-65. *See also* Kroll & Tauber, *Fiduciary Responsibility Under ERISA*, 35 N.Y.U. Inst. on Fed. Tax'n. 1059 (1977); Little & Thrailkill, *Fiduciaries Under ERISA: A Narrow Path to Tread*, 30 Vand.L.Rev. 1(1977). This duty was flagrantly violated in this case.

In the case of *Corley v. Hecht Co.*, 530 F. Supp 1155 (D.C.D.C. 1982), the following significant legal issues related to this case were discussed:

1. ownership of Welfare Benefit Plan group insurance dividend refunds, after the enactment of ERISA;

2. an employer's violation of its ERISA duty of disclosure to plan participants of a group insurance policy dividend refund and;

3. sanctions imposed on an employer for violating ERISA's reporting and disclosure provisions.

The district court in *Corley* held that the defendant in that case had violated ERISA's reporting and disclosure provisions and then imposed sanctions similar to those sought by the petitioner John Doe in this case, namely:

1. an accounting and return of group insurance policy dividends;
2. preparation of an amended summary plan description and;
3. the removal of existing ERISA fiduciaries and the nomination of successor fiduciaries subject to court approval and review.

No less is required in this case. Congress, in its findings and declaration of policy, sought to assure the equitable character of trustee benefit plans. For that reason it established "standards

of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and [provided] for appropriate remedies, sanctions, and ready access to the Federal courts." *See* section 2(b) of ERISA, 29 U.S.C. 1001(b). Having charged trustees with the duty to implement this national policy, it follows that the equitable powers which a trustee exercises are fettered with meaningful standards, implicit in the reference to "remedies, sanctions, and ready access to the Federal courts." *Id.*

CONCLUSION

The petition for a writ of certiorari should be granted. Because the error of the lower courts is manifest in light of ERISA'S statutory language and history and the pertinent opinions of the tax court and other courts of appeals, the Court may also wish to consider summary reversal of the lower courts' opinions.

Respectfully submitted,

W. Sherman Rogers
Attorney-At-Law
Arena Tower II, Suite 1040(B)
7324 Southwest Freeway
Houston, Texas 77074
(713) 271-1748
(202) 686-6436

AUGUST 1986

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 85-2108
85-2526

JOHN DOE,
PLAINTIFF-APPELLANT,

v.

A CORPORATION, ET AL.,
DEFENDANTS-APPELLEES.

Appeals from the United States District Court for the Southern District of Texas

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC
(Opinion) April 18
5 Cir., 1986 F.2d

May 23, 1986

Before GEE, POLITZ and GARWOOD,
Circuit Judges.

PER CURIAM:

(*) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc

is DENIED

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

(Signed)
United States Circuit Judge

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Nos. 85-2108
85-2526

JOHN DOE,
PLAINTIFF-APPELLANT,

v.

A CORPORATION, ET AL.,
DEFENDANTS-APPELLEES.

Appeals from the United States District Court for the Southern District of Texas

---

(April 18, 1986)

Before GEE, POLITZ and GARWOOD, Circuit Judges.

PER CURIAM:
AFFIRMED. See Local Rule 47.6.
Costs on appeal are taxed against the appellant.

ISSUED AS MANDATE: June 2, 1986

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-396
JOHN DOE,

PLAINTIFF-APPELLANT,

v.

A CORPORATION, ET AL.,

MEMORANDUM AND ORDER

Pending before the Court is the Defendants' motion for summary judgment. For the reasons set forth below, the Court has concluded that the motion should be granted.

The pertinent background is set forth in the Court's Memorandum and Order of December 10, 1984, entered in *Doe v. A Corporation*, CA H-81-397 (appeal pending) and *Doe v. A Corporation*, 709 F. 2d 1043. (5th Cir. 1983). Plaintiff's claims in this case pertain to a contributory group life plan offered as part of A Corporation's Benefit Plan. When Plaintiff joined A Corporation as a staff attorney, he was given a Summary Plan Description which decribed a departing employee's right to convert a group life policy to an individual policy. The description noted that no medical examination was required and that a departing employee could obtain any available form of insurance except term insurance. Plaintiff has given sworn testimony to the effect that,

during his employment as a lawyer for A Corporation, he studied all Benefit Plan documents, including the insurance contracts that provided insurance coverage to employees who elected contributory group life insurance coverage. The contract issued by the Defendant insurance company clearly and expressly provides that, upon termination of employment, the employee is entitled to the issuance of an individual life insurance policy, except for a policy of term insurance.

Plaintiff resigned from A Corporation in March of 1980, after having commenced employment in May of 1975. He contends that he sought insurance of an ~~in~~dividual term life policy and was refused. He reiterated his demand for conversion of his life insurance policy and for the Thrift Plan relief he later unsuccessfully pursued in CA H-81-397. When these demands proved fruitless, he added assertions that "millions of dollars" were owed to Benefit Plan participants as a result of the administration of the contributory group life plan. Plaintiff has persisted in seeking an accounting and public disclosure concerning the group life plan, despite rulings by the Fifth Circuit and this Court that he may not act as a representative for any other persons who may be similarly situated.

It is now clear from the record before us that Plaintiff demanded in writing that Defendants pay him a "contingency attorney fee" equal to 10% of the "dividends" purportedly amounting to an undisclosed "fund of millions of dollars." Plaintiff further wrote to Defendants that if his demands were not met within a month, he would initiate litigation and refer the matter to various government agencies. A Corporation's lawyers

then suggested that Plaintiff reconsider his position in light of his ethical obligations as a former lawyer of A Corporation. He replied, by letter dated January 26, 1981 that he had a "fiduciary duty" to Plan participants, regardless of the "question concerning my legal ethics." (This assertion has been rejected by the Fifth Circuit in *Doe*, 709 F. 2d at 1048.) Plaintiff further asserted in the January 26th letter that his position on the need for disclosure and an accounting were the fruits of "recent legal research" which he attached to the letter. The attachments were Department of Labor regulations promulgated in March, 1978 and a secondary research publication dated May 1, 1979, both of which amply pre-date his resignation from A Corporation. Finally, the January 26th letter reiterated his demand for a 10% share of the "fund of millions of dollars."

On February 18, 1981, Plaintiff filed this action and CA H-81-397, asserting his own claims and claims on behalf of a purported class. He sought special *personal* awards of one-third of the alleged "dividends to be refunded," attorney fees to be based on a percentage of the dividends allegedly owed to the purported class and an extraordinary personal award "in excess of $300,000." Plaintiff has persisted in urging these class dimensions of the action, including his right to an accounting on behalf of all A Corporation employees and the recovery of attorney fees, despite the law of this case which is clearly to the contrary.

Plaintiff's claim for damages on his individual claim consists of a contention that the amount shown as "dividends" on the Plan's Treasury

Department reports and filings for 1975 through 1978 should have been returned to the participants instead of being credited to A Corporation. Plaintiff's only legal authority in support of this contention is the Labor regulations attached to the January 26th letter discussed above. Those regulations (29 C.F.R.2520. 104-20 *et seq.*) confer an exemption from certain reporting requirements on small welfare plans, which are defined as those with fewer than 100 participants. A Corporation's Benefit Plan has always had far in excess of 100 participants.

Total premiums paid by Plan participants for 1975 through 1978 were $58,915.715. The total amount of "dividends" during that time was $6,957,225. Simple arithmetic shows that any "dividend " allegedly owed to Plaintiff (assuming *arguendo* his contention has any merit, which it plainly does not) would be 11.8% of his individual premium payments. His contributions during those years were $862.10, yielding a "dividend" of $101.73 His total contributions during employment with A Corporation amounted to $1,247.16.

On January 31, 1985, Defendants made an offer of judgment pursuant to Rule 68, F.R.Civ. P., in the amount of $1,247.16, which represents the entire amount of Plaintiff's premium payments. The offer was made without any admission of liability. Rather, it was tendered by Defendants (and apparently rejected by Plaintiff) for the express reason that continuation of the litigation would be, in the Defendants' collective opinion, an unreasonable expense. Further, this amount

clearly exceeds the $101.73 which this Court would award as actual damages on Plaintiff's individual claim, if there were any merit to it.

As noted above, the Fifth Circuit made it abundantly clear (*see* 709 F. 2d, *esp.* at 1048) that Plaintiff may only assert his personal cause of action. On remand, this Court ordered that Plaintiff file amended complaints in this cause and H-81-397 to remove all allegations other than his personal claims. When he filed amended complaints reasserting purported class claims, those claims were stricken.

Nonetheless, in response to Defendants' motion for summary judgment and offer of judgment, Plaintiff persists in his contentions that he is entitled not only to compensatory relief on his individual action but also to an accounting and injunctive relief on behalf of other Plan participants. In support of these contentions, Plaintiff relies on the general wording of ERISA but ignores the specific law of the case. Further, he unsuccessfully attempts to create a fact issue on the merits of his claim which is so blatantly at odds with both the documentary evidence of record and his prior sworn statements that no *genuine* issue of fact exists.

The legal authorities cited by Plaintiff discussed above are inapposite to the instant facts. Assuming *arguendo* that he is correct in making such arguments, the offer of judgment moots his claim for compensatory damages. He is no longer a participant in the Plan at issue and has no (personal) cognizable legal interest in the present or future administration of the Plan. It is axiomatic that injunctive and declaratory relief are available only to those litigants whose rights will be

harmed if such relief is not forthcoming. *E.g., United States v. W. T. Grant Co.*, 345 U.S. 629 (1953); *see also*, 29 U.S.C. 1132(a). (ERISA provides for such relief if the party shows himself to be entitled to such relief). Similarly, Plaintiff is not entitled to full accounting since his share of any refund which might be owed him is readily ascertainable (see above), and since the only other apparent purpose for such an accounting would be to improperly obtain information concerning the purported claims of other Plan participants. *See Doe*, 709 F. 2d at 1048. Cases cited by Plaintiff to the contrary are clearly inapposite here.

Defendants have shown themselves to be entitled to judgment based on the foregoing discussion of the merits. Moreover, the Court notes that the record discloses attempts by Plaintiff to not only vindicate his own rights but to mulct his former employer. It indeed has been shown that Doe has "attempted either to mulct or blackmail the corporation" (709 F.2d at 1050). Plaintiff is not just a former employee of A Corporation, he is a former in-house counsel. As such he reasonably should have known better than to follow the improper course of conduct which is evidenced by the totality of the record in this case and the companion case (H-81-397). Hence it is clear that Plaintiff has violated the spirit, if not the letter, of Rule 11, F.R.Civ.P., and that he is before us with "unclean hands." The Defendants are entitled to judgment on the grounds of Plaintiff's bad faith and unclean hands. The Court will enter judgment in Defendants' favor on those grounds as an alternative basis to our decision on the merits.

Finally, Plaintiff has requested an award of attorney fees pursuant to 29 U.S.C. 1132(g)(1) which provides for a discretionary award of such fees and of taxable costs to either party. Plaintiff certainly is not entitled to such an award, but the Defendants are. In light of Plaintiff's meritless allegations and other litigation misconduct, Defendants should be granted attorney fees and costs. The Court will retain post-judgement jurisdiction solely for the purpose of determining the proper amount of attorney fees. We note that Defendants filed a motion for an award of attorney fees based primarily on Rule 11, F.R.Civ.p., in the companion case of H-81-397. The Court has held that motion under advisement pending a determination of the instant motion for summary judgment. Since the cases are related, the Court concluded that both records should be fully examined before deciding whether Plaintiff has violated the proscriptions of Rule 11. The totality of the records in these two related cases clearly evidences bad faith and vexatiousness on the part of Plaintiff. Therefore, the motion for attorney fees in H-81-397 will be granted by separate order.

It is hereby ORDERED that Defendants' motion for summary judgment be GRANTED; it is further ORDERED that Defendants recover reasonable attorney fees and taxable costs, the amount of which will be determined at a later time.

A Final Judgment will be entered accordingly.

DONE in Houston, Texas this 27th day of June, 1985.

Signed
JAMES DEANDA
United States District Judge

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-396
JOHN DOE,

PLAINTIFF-APPELLANT,

v.

A CORPORATION, ET AL.,

FINAL JUDGMENT

In accordance with the Memorandum and Order filed in the above-referenced cause on this date, judgment is hereby entered for the DEFENDANTS, A. Corporation, *et al.*

All taxable costs are hereby assessed against the Plaintiff, John Doe.

Defendants shall recover reasonable attorney fees, the amount of which shall be determined on a post-judgment basis.

This is Final Judgment.

DONE in Houston, Texas, this 27th day of June, 1985.

Signed

JAMES DEANDA
UNITED STATES DISTRICT JUDGE

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-397
JOHN DOE,

PLAINTIFF-APPELLANT,

v.

A CORPORATION, ET AL.,

MEMORANDUM AND ORDER

Pending before the Court are the parties' cross-motions for summary judgment. For the reasons set forth, the Court has concluded that the Defendants' motion should be granted and the Plaintiff's motion should be denied.

This case is before us on remand from a partial reversal by the Court of Appeals in *Doe v. A. Corporation*, 709 F. 2d 1043 (5th Cir. 1983). The basic facts and background of the litigation are set forth in that opinion and need not be restated here.

Defendants first contend that Plaintiff is barred from prosecuting his claims by the doctrines of judicial estoppel and "unclean hands." Judicial estoppel is intended to protect the integrity of judicial proceedings. The doctrine forecloses a litigant from making assertions or legal claims in one judicial proceeding that are inconsistent with

sworn statements made in a prior proceeding wherein the contrary assertions were material to the outcome of the earlier proceeding. *U.S. Life Corp. v. U.S. Life Ins. Co.*, 560 F. Supp. 1302 (N.D. Tex. 1983), and cases cited therein; *Long v. Knox*, 291 S.W. 2d. 292 (Tex. 1956). The party invoking judicial estoppel need not have been a party to the prior litigation. *U.S. Life*, 560 F. Supp. at 1305; *see also Gibson v Johnson*, 414 S.W. 2d 235 (Tex. Civ. App.-Tyler 1967, writ ref'd n.r.e.), *cert. denied* 390 U.S. 946 (1968).[1] Neither is it necessary that the party invoking the doctrine have relied on the earlier statement (as is true of equitable estoppel). Finally, it is not necessary that the prior proceeding resulted in a determination in favor of the litigant making the inconsistent statements or claims, so long as the statements or claims had a material effect on the outcome. *Long v. Knox, supra.*

Plaintiff asserts here that he is entitled to employer contributions to the Thrift Fund account maintained on his behalf while he was employed as legal counsel for Defendants. Specifically, he argues that ERISA requires that he be credited for a fifth year of vesting service because he worked 1,000 hours in that year (even though he didn't work twelve months in that year). Plaintiff testified in his July, 1984 deposition that he become entitled to the employer contributions no later than the end of November, 1979. On

---

[1] The Fifth Circuit has suggested in dicta that the doctrine may not be invoked by a non-party to the prior proceeding. *Colonial Refrigerated Transportation, Inc. v. Mitchell*, 403 F. 2d 541 (5th Cir. 1968); *Markow v. Alcock*, 356 F. 2d 194 (5th Cir. 1966). The peculiar facts and procedural postures of these cases distinguish them both from the instant case and cases such as *U.S. Life , supra.*

December 6, 1979, Plaintiff swore to the opposite effect in his divorce proceeding. In sworn answers to interrogatories, Plantiff listed stock in the Thrift Fund which had been purchased with A. Corporation's contributions as "non-vested" asset. This contradiction is blatant and material. Further, as is illustrated by a thorough examination of the record, the statement that the employer contributions were non-vested had a direct impact on the ultimate disposition of the property settlement approved in Plaintiff's divorce decree. A further review of the record shows that, throughout the course of discovery in this case, Plaintiff has repeatedly attempted to conceal this inconsistency. Such behavior shocks the Court's conscience and underscores the wisdom of applying the doctrine of judicial estoppel in cases such as this one.

Defendants further contend that Plaintiff's claims should be barred by the doctrine of "unclean hands." The Court of appeals noted that:

> If, indeed, it develops after the facts are fully explored that Doe attempted either to blackmail or to mulct the corporation, we do not condone that conduct. If he has violated the Code of Professional Responsibility, disciplinary charges should be brought against him. The district court did not, however, dismiss Doe's personal claim because of his misconduct. 709 F. 2d at 1050

This statement reflects the well-settled law that unclean hands can stand as a bar to recovery, so long as the plaintiff's wrongdoing is related to the subject matter of the litigation and the defendant has been injured by the wrongdoing. *Mitchell Bros. Film Corp. v. Cinema Adult Theater*, 604 F. 2d 852, 863 (5th Cir. 1979).

Defendants' factual basis for invoking the unclean hands doctrine is essentially twofold. First, Plaintiff is currently disavowing the validity of legal advice he gave to the Defendants while in their employ regarding some of the basic issues in this lawsuit. Plaintiff rendered legal opinions and letters to the effect that Defendants' ERISA Plan (including administration of the Thrift Fund) was in complete compliance with applicable laws. Plaintiff even conceded in his deposition that at the time he wrote one of his opinions, the Plan was properly administered in accordance with the elapsed time regulations which he now challenges in this case. Moreover, Plaintiff played a role in preparing answers to interrogatories in defense of A. Corporation in another lawsuit regarding the vesting provisions of the Plan, and responded to a formal inquiry regarding the use of the 1,000-hour method (as opposed to the year-in-service method) of computing participation in the Plan by stating that a full year in service was required for participation. Plaintiff now says the opposite is true.[2]

---

[2] The litany of legal positions and opinions taken by Plaintiff when he acted as Defendants' attorney, but which he now disavows in this suit, is by no means exhaustive. The record is replete with instances of such unethical behavior.

The second factual aspect of Defendants' unclean hands argument is that Plaintiff has engaged in litigation misconduct. Specifically, Plaintiff has persisted in urging the class elements of his action despite the Fifth Circuit's clear prohibition of his maintaining a class action and has attempted to pursue discovery of information pertinent only to purported claims of others. Moreover, as alluded to earlier, Plaintiff has attempted to conceal some of his prior inconsistent statements. Plaintiff has been reluctant to comply with certain orders of this Court, as the record amply reflects. There is some evidence that Plaintiff attempted to blackmail A. Corporation at an early stage of this litigation, although the evidence is not so clear that we can affirmatively find that the Plaintiff did in fact attempt to blackmail the corporate Defendant. Nonetheless, the actions of Plaintiff regarding the purported class allegations and the discovery process, together with his disavowal of legal advice previously given by him to the Defendants concerning the very essence of this lawsuit, merit the invocation of the unclean hands doctrine. The The plaintiff's wrongdoings have injured the Defendants by virtue of the fact that they have expended significant litigation expenses arising out of Plaintiff's litigation misconduct *and* have found themselves in the awkward position of defending the ERISA Plan which Plaintiff had advised them was legally proper.

Our analysis of Plaintiff's conduct in this lawsuit is not complete without making reference to the apparent ethical transgressions of the Plain-

tiff. First, the conduct set forth above appears to violate DR 1-102 of the Texas State Bar Rules, which reads in pertinent part:

> (A) A lawyer shall not:
> .... (4) Engage in conduct involving dishonesty, fraud, deceit or misrepresentation,
> (5) Engage in conduct that is prejudicial to the administration of justice.
> (6) Engage in any other conduct that adversely reflects on his fitness to practice law.

Moreover, EC 1-5 states that:

> A lawyer should maintain high standards of professional conduct . . . . and he should refrain from all illegal and morally reprehensible conduct.

The totality of Plaintiff's behavior in this case illustrates a saga of deceit, dishonesty, and vexatiousness in the discovery process, and a total disregard for the attorney-client relationship. A client should be able to take the advice of an attorney without living in fear that the same attorney will later both recant the substance of the advice *and* personally sue the client for relying on that advice. Even in an era of permissiveness, this behavior is morally, if not legally, reprehensible.

Second, as the Fifth Circuit held, the Plaintiff is prevented from representing a purported class in this lawsuit by the strictures of Canon 4 (regarding confidentiality in the attorney-client relationship). Despite this clear prohibition, Plaintiff has persisted in his attempts to discover—and perhaps disseminate—information related to the purported claims of others.

Third, the Canons of Ethics exhort lawyers to avoid even the appearance of impropriety. *E.g.*,

DR 9-101. EC 9-6 states that every lawyer has solemn duty "to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect, and trust of his clients and of the public; and to strive to avoid . . . the appearance of impropriety." It is inconceivable that either the public at large or any specific client would place confidence, respect and trust in an attorney who behaves in the manner Plaintiff has exhibited in the course of this litigation. Plaintiff has violated at least the spirit, if not the letter, of Canon 9.

In light of all the foregoing, the Court concludes that Plaintiff's claims are barred by the doctrine of unclean hands. This doctrine stands as an independent ground for granting Defendants' motion. The claims are also foreclosed by judicial estoppel, as discussed above.

Assuming *arguendo* that Plaintiff's claims are not barred by judicial estoppel or unclean hands, Plaintiff's claims must fail because of the pertinent substantive law.

In gist of Plaintiff's contentions on the merits of his claims is that (1) ERISA requires that all benefit plan participants be given credit for one year of service for vesting purposes once they have completed 1,000 hours of service; and (2) any administrative regulation which authorizes a different method of counting service vis-a-vis vesting is unlawful. These contentions are ill-founded for the reasons set forth below.

The congressional findings and declarations set forth in ERISA note that "many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting

provisions in such plans." 29 U.S.C. 1001 (a). An express policy of ERISA is is "to vest the accrued benefits of employees with significant periods of service." 29 U.S.C. 1001 (c) In furtherance thereof, Congress established minimum vesting standards in Section 203 of the Act (29 U.S.C. 1053). One of the permissible alternative methods for computing a plan's vesting requirements is found in Section 203 (a) (2) (B). This subsection states that a plan is proper if an employee who has completed at least five years of service has a nonforfeitable right to a percentage of his accrued benefits derived from employer contributions. The subsection goes on to set out a table of minimum percentages to which an employee must become entitled after specified years of service (beginning with five years).

Sections 203 (b) (2) (A) provides that:

> . . . . the term "year of service" means a calendar year, plan year, or other 12-month consecutive period designated by the plan (and not prohibited under regulations provided by the Secretary) during which the participant has completed 1,000 hours of service

In 1980, regulations were promulgated which expressly permit plans to calculate vesting service by calendar years, regardless of the number of hours actually worked. 45 Fed. Reg. 48,980 (1980); 26 C.F.R. 1.410(a)-7(a)(ii) (1982); 26 C.F.R. 1.411(a) -5(a) (2), 1.411(a) -6(c)(2) (1982).

The Plan at issue provides that an employee has a vested right to 100% of the employer contributions to the Thrift Account after the employee has completed five years of credited vesting service. (This percentage far exceeds the minimum set by the Act itself.) The Plan defines vesting

service as the elapsed time between an employee's commencement date and the date he leaves the company, with credits given for *(inter alia)* vacation, sick leave and leaves of absence. The Plan does not contain any method for counting actual work-hours for salaried professional employees, such as the Plaintiff.

It is undisputed that Plaintiff voluntarily left A Corporation's employ several months before completing his fifth year of service. A thorough examination of the Defendants' Plan, ERISA and the pertinent regulations (discussed above) leaves the Court with the firm impression that Plaintiff's contentions are ill-founded. The Plan satisfies both the literal wording and the intent of Section 203 and its concomitant regulations, and there is no merit whatsoever to the argument that those regulations are unlawful. Furthermore, contentions virtually identical to those urged by the Plaintiff were rejected in *Swaida v. IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd mem.*, 728 F. 2d 159 (2d Cir. 1984). This Court adopts the reasoning and holding of *Swaida*. ERISA does not absolutely mandate use of the 1,000-hour method to calculate vesting periods (especially regarding salaried professional employees). Regulations authorizing use of the "elapsed time method" in plans such as the one at issue lie within the Treasury Department's competence and result from a proper exercise of delegated authority. The employer who structures a pension plan in conformity-with such regulations is completely justified in denying a former employee's claim to vested funds where, as here, that employee has not completed the term of service required by the plan.

The Plaintiff further contends that the Defendants' administration of the Plan does not comport with applicable regulations. The essence of argument is that a "year of service" is not a "period of service." This is nonsense, both linguistically and legally. Nowhere can support be found for this position in 26 C.F.R. 1.410(a)-7(a) or in ERISA itself. *See also, Swaida, supra* at 484-485.

Plaintiff's final contention is that the Plan uses, or at some point used the 1,000-hour method of counting service for vesting purposes. The only evidence in support of this is a Form EBS-1 filed by the Plan in June, 1976. This form is simply a "red herring" since it was filed very early on in the administration of ERISA, at a time when it was not known whether the regulations would be promulgated so as to require use of the 1,000-hour method. The Plan has never actually used this method, a fact which is well-known by the Plaintiff. (Again, Plaintiff essentially conceded this fact on deposition.) The documentary evidence and various affidavits confirm that the method has never been utilized. An examination of the record clearly shows that Plaintiff has raised no *genuine* issue of material fact, even in his most recent affidavit. The "facts" recited in that affidavit are (as the Defendants have meticulously pointed out) either legally irrelevant or unsupported by (and, generally, *contradicted* by) the documentary evidence. The Court finds that there are no genuine issues of material fact, and concludes that the Defendants are entitled to judgment as a matter of law.

It is hereby ORDERED that Defendants' motion for summary judgment be GRANTED,

and that Plaintiff's motion for summary judgment be DENIED.

A Final Judgment will be entered accordingly.

DONE in Houston, Texas, this 10th day of December, 1984.

(Signed)
James DeAnda
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

Civil Action No. H-81-397
JOHN DOE,

PLAINTIFF-APPELLANT,

v.

A CORPORATION, *et. al.*

FINAL JUDGMENT

In accordance with the Memorandum and Order filed in the above-referenced cause on this date, judgment is hereby entered for the DEFENDANTS, A. Corporation, *et al.*

All taxable costs are hereby assessed against the Plaintiff, John Doe.

This is a Final Judgment.

DONE in Houston, Texas, this 10th day of December, 1984.

Signed

James DeAnda
UNITED STATES DISTRICT JUDGE

APPENDIX E

Excerpts for EBS-1 Plan Description filed by Defendant Benefit Plan of A Corporation with Department of Labor dated 6-14-1976

Question 15 and Response page 3 EBS-1 dated 6-14-1976

FORM - 1 (2-76) Page 3

15. Indicates sources and methods of determining contributions to the plan (mark X in all applicable boxes)

Employer's Contribution

(a) ☐ Fixed rate
- **(i)** ☐ Per hour
- **(ii)** ☐ Per day
- **(iii)** ☐ Per week
- **(iv)** ☐ Per month
- **(v)** ☐ Per annum

(b) ☐ Based on profits . . . Formula
(c) ☐ Based on profits . . . Discretionary
(d) ☐ Percentage of payroll
(e) ☒ Actuarial rate of determination
(f) ☐ None
(g) ☒ Other (specify)

Thrift: equal to employee regular contribution. Insurances: insurance premium. Other benefits: amount required to provide benefit.

Employee's Contribution

(h) ☒ Voluntary
☐ Mandatory
(i) ☐ Fixed rate
- **(i)** ☐ Per hour
- **(ii)** ☐ Per day
- **(iii)** ☐ Per week
- **(iv)** ☐ Per month
- **(v)** ☐ Per annum

(j) ☒ Percentageof compensation
(k) ☐ Part of dues to union
(l) ☐ Assesment by union
(m) ☐ None
(n) ☐ Other (spcify) _____

_____

Questions 19 and Response Page 4 EBS—1 dated 6-14-1976

19 Indicate the general vesting provisions of the plan for employer contributions:

(a) Vesting Schedule:

(i) ☐ Full (100%) and immediate

(ii) ☐ Full (100%) vesting after 3 years of service

(iii) ☒ Full (100%) vesting after 10 yrs. of service(Annuity)

(iv) ☐ Rule of 45; (5 years of service and where the sum of the participant's age and years of service equal or exceed 45)

(v) ☐ 25% vesting after 5 years, 5% additional for each of the next 5 years, and 10% additional for each of the next 5 years

(vi) ☐ Full (100%) vesting within 5 years after contributions are made (Class Year Plan Only)

(vii) ☐ For each year of employment, commencing with the 4th such year, vesting not less than 40% after 4 years of service, 5% additional for each of the next 2 years, and 10% additional for each of the next 5 years

(viii) ☒ Other (describe) *Full vesting at 5 years of service, or, if earlier, death or non retirement (savings and investment)*

(b) Check if you exclude the following years of service under the vesting provisions of the plan:

(i) ☐ Years of service before age 22
(ii) ☐ Years of service during which the employee declined to contribute to the plan requiring employee contributions
(iii) ☐ Years of service during which the employer did not maintain the plan or a predecessor plan

Question 21 and Response page 4 EBS-1 dated 6-14-1976

21. Indicate how length of service is determined for participation, vesting and full benefit accrual:

(a) Mark X in the appropriate boxes to indicate the computation period:

Participation

(i) ☐ Employment commencement date
(ii) ☐ Other (specify) _____

_____

Vesting

(iii) ☐ Calendar year
(iv) ☐ Plan Year
(v) ☒ Other (specify) *individual's employment year* _____

Full Benefit Account

(vi) ☐ Calendar year
(vii) ☐ Plan Year
(viii) ☐ Other (specify) *individual's employment year* _____
(ix) ☐ Not Applicable

(b) Indicate hours required for one year of service for purposes of participation, vesting and full benefit accrual:

Participation	Vesting	Full Benefit Account
1,000 (hours)	*1,000 (hours)*	*1,000 (hours)*

(c) Mark in the appropriate boxes to indicate whether employees are credited for hours:

	Participation (1)	Vesting (2)	Full Benefit Accrual (3)
(i) Actually worked	☒	☒	☒
(ii) Sickness	☒	☒	☒
(iii) Vacation	☒	☒	☒
(iv) Disability	☐	☐	☐
(v) Layoff	☐	☐	☐
(vi) Other _____	☐	☐	☐

APPENDIX F

EXCERPT OF MAY 1976 SUMMARY PLAN DESCRIPTION

Transfers, Leaves of Absence, Terminations

Your Thrift Fund Account

If you have 5 or more years of credited service at the time of your termination, [. . .] contributions to your Thrift Fund account are 100 percent vested, and your net account will be distributed to you, along with information from which you can calculate your income tax liability.

If you have less than 5 years of credited service, an amount equivalent to [. . .] Thrift Fund contributions will be subtracted from your Thrift Fund account and the balance will be distributed to you. However, any [. . .] contributions that may have been made while you were in overseas service prior to April 1974 (or while you were continuously in overseas service from March 31, 1974) will not be subtracted before the balance is distributed to you.

Contributory Group Life Insurance
Family Adjustment Insurance

Your coverage continues for 31 days beyond the date of termination, and for up to a year if you are totally disabled at termination and remain disabled. There is also a Conversion Privilege under which you can obtain individual insurance coverage in any amount up to your coverage under the [. . .] group plan. This indivivual insurance can be obtained by contacting the insurance company within 31 days of your termination of employment. No medical examination is required.

---

*Deleted to conform with the district court's anonymity order.

APPENDIX G

ERISA Group Insurance Dividend Disclosure Regulations 29 C.F.R. 2520, 104-20 and 29 C.F.R. 2520, 104-21

29 C.F.R. 2520.104-20 Limited exemption for certain small welfare plans.

(a) *Scope.* Under the authority of section 104 (a)(3) of the Act, the administrator of any employee welfare benefit plan which covers fewer than 100 participants at the beginning of the plan year and which meets the requirements of paragraph (b) of this section is exempted from certain reporting and disclosure provisions of the Act. Specifically, the administrator of such plan is not required to file with the Secretarty any of the following documents: Plan description, copy of the summary plan description, description of a material modification in the terms of a plan or change in the information required to be included in the plan description, annual report, and terminal report. In addition, the administrator of a plan exempted under this section—

(1) Is not required to furnish participants covered under the plan and beneficiaries receiving benefits under the plan with statements of the plans assets and liabilities and receipts and disbursements and summary of the annual report required by section 104(b)(3) of the Act;

(2) Is not required to furnish upon written request of any participant or beneficiary a copy of the plan description, annual report, and any terminal report , as required by section 104 (b) (4) of the Act;

(3) Is not required to make copies of the plan description and annual report available for examination by any participant or beneficiary in the principal office of the administrator and such other places as may be necessary, as required by section 104 (b) (2) of the Act.

(b) *Application.* This exemption applies only to welfare benefit plans—

(1) Which have fewer than 100 participants at the beginning of the plan year;

(2)(i) For which benefits are paid as needed solely from the general assets of the employer or employee organization maintaining the plan, or

(ii) The benefits of which are provided exclusively through insurance contracts or policies issued by an insurance company or similar organization which is qualified to do business in any State or through a qualified health maintenance organization as defined in section 1310(d) of the Public Health Service Act, as amended, 42 U.S.C. 300e-(9)d, the premiums for which are paid directly by the employer or employee organization from its general assets or partly from contributions by its employees or members, *Provided,* That contributions by participants are forwarded by the employer or employee organization within three months of receipt, or

(iii) Both; and

(3) For which, in the case of an insured plan—

(i) Refunds, to which contributing participants are entitled, are returned to them within three months of receipt by the employer or employee organization, and

(ii) Contributing participants are informed upon entry into the plan of provisions of the plan concerning the allocation of refunds.

(c) *Limitations.* This exemption does not exempt the administrator of an employee benefit plan from any other requirement of Title I of the Act, including the provisions which require that plan administrators furnish copies of the summary plan description to participants and beneficiaries (section (104(b)(1)), and furnish certain documents to the Secretary of Labor upon request (section 104 (a)(1)), and which authorize the Secretary to collect information and data from employee benefit plans for research and analysis (section 513).

(d) *Examples.* (1) A welfare plan has 75 participants at the beginning of the plan year and 105 participants at the end of the plan year. Plan benefits are fully insured and premiums are paid directly to the insurance company by the employer pursuant to an insurance contract purchased with premium payments derived half from the general assets of the employer and half from employee contributions (which the employer forwards within three months of receipt). Refunds to the plan are paid to participating employees within three months of receipt as provided in the plan and as described to each participant upon entering the plan. The plan appoints the employer as its plan administrator.

The employer, as plan administrator, provides summary plan descriptions to participants and beneficiaries. He also makes copies of certain plan documents available at the plan's principal office and such other places as necessary to give participants reasonable access to them. The exemption provided by 2520.104-20 applies even though the plan has more than 100 participants by the end of the plan year because it had fewer than 100 participants at the beginning of the plan year and otherwise satisfied the conditions of the exemption.

(2) A welfare plan is established and maintained in the same way as the plan described in example (1), except that a trade association which sponsors the plan is the holder of the insurance contract. Since the plan still sends the premium payments directly to the insurance company, the exemption applies, as in example (1).

[43 FR 10148, Mar. 10, 1978, as amended at 46 FR 5884, Jan. 21, 1981]

2520. 104-21 Limited exemption for certain group insurance arrangements

(a) *Scope.* Under the authority of section 104 (a)(3) of the Act, the administrator of any employee welfare benefit plan which covers fewer than 100 participants at the beginning of the plan year and which meets the requirements of paragraph (b) of this section is exempted from certain reporting and disclosure provisions of the Act. Specifically, the administrator of such plan is not required to file with the Secretary any of the following documents: Plan description, copy of the summary plan description, description of a material modification in the terms of a plan or change in the information required to be included in the plan description and terminal report. In addition, the administrator of a plan exempted under this section:

(1) Is not required to furnish upon written request of any participant or beneficiary a copy of the plan description and any terminal report, as required by section 104(b)(4) of the Act;

(2) Is not required to make copies of the plan description available for examination by any participant or beneficiary in the principal office of the administrator and such other places as may be necessary, as required by section 104(b)(2) of the Act.

(b) *Application.* This exemption applies only to welfare plans, each of which has fewer than 100 participants at the beginning of the plan year and which are part of a group insurance arrangement if such arrangement:

(1) Provides benefits to the employees of two or more unaffiliated employers, but not in connection with a multiemployer plan as defined in section 3(37) of the Act and any regulations prescribed under the Act concerning section3(37);

(2) Fully insures one or more welfare plans of each participating employer through insurance contracts purchased solely by the employers or purchased partly by the employers and partly by their participating employees, with all benefit payments made by the insurance company: *Provided*, That—

(i) Contributions by participating employees are forwarded by the employers within three months of receipt.

(ii) Refunds, to which contributing participants are entitled, are returned to them within three months of receipt, and

(iii) Contributing participants are informe upon entry into the plan of the provisions of th plan concerning the allocation of refunds; and

(3) Uses a trust (or other entity such as trade association) as the holder of the insuranc contracts and the conduit for payment of premi ums to the insurance company.

(c) *Limitations.* This exemption does not exempt the administrator of an employee benefit plan from any other requirement of Title I of the Act, including the provisions which require that plan administrators furnish copies of the summary plan description to participants and beneficiaries (section 104(b)(1)), file an annual report with the Secretary of Labor (section 104(a)(1)(A) and furnish certain documents to the Secretary of Labor upon request (section 104(a)(1)), and authorize the Secretary of Labor to collect information and data from employee benefit plans for research and analysis (section 513).

(d) *Examples.* (1) A welfare plan has 25 participants at the beginning of the plan year. It is part of a group insurance arrangement which provides benefits to employees of two or more unaffiliated employers, but not in connection with a multiemployer plan as defined under the Act. Plan benefits are fully insured pursuant to insurance contracts purchased with premium payments derived half from employee contributions (which the employer forwards within three months of receipt) and half from the general assets of participating employers. Refunds to the plan are paid to participating employees within three months of receipt as provided in the plan and as described to each participant upon entering the plan. A trade association is the holder of the insurance contract and acts as a conduit for payments, receiving premium payments from

participating employers and paying the insurance company. The plan appoints the trade association as its plan administrator. The association, as plan administrator, provides summary plan descriptions to participants and beneficiaries, enlisting the help of the participating employer in carrying out this distribution. The plan administrator also makes copies of certain plan documents available to the plan's principal office and such other places as necessary to give participants reasonable access to them. The plan administrator files with the Secretary an annual report covering activities of the plan, as required by the Act and such regulations as the Secretaty may issue. The exemption provided by 2520. 104-21 applies because the conditions of 2520. 104-21(c) have been satisfied.

(2) A welfare plan has 75 participants at the beginning of the plan year. It is part of a group insurance arrangement and its benefits and credits are paid in the same manner as in example (1) of 2520.104-21. A trade association acts as a conduit for payments, acting through its agent, an independent insurance brokerage firm, and is the holder of the insurance contract. The plan appoints an officer of the participating employer as the plan administrator. The officer, as plan administrator, performs the same reporting and disclosure functions as the administrator in example (1) of 2520.104-21, enlisting the help of the association in providing summary plan decriptions and necessary information. The exemption provided by 2520.104-21 applies.

(3) A welfare plan has 125 participants at the beginning of the plan year. It is part of a group insurance arrangement and its benefits and credits are paid in the same manner as in the previous examples. A trade association acts as a

conduit for payments and is the holder of the insurance contrct. The plan appoints the association as plan administrator. The association, as plan administrator, performs all the reporting and disclosure requirements of Title I of the Act for the plan. These include filing with the Secretary a plan description, summary plan description, description of any material modifications in the terms of the plan or change in the information required to be included in the plan description, annual report, and certain other documents if required by regulations or request of the Secretary of Labor. The requirements also include disclosure of certain documents to participants and beneficiaries, including among others the summary plan description and summary of the annual report. The plan administrator obtains necessary information not available in its records-such as the fact that there are 125 participants—from the plan. The exemption provided by 2520.104-21 does not apply because the plan had more than 100 participants at the beginning of the plan year although the other conditions of paragraph (c) are satisfied.

(4) A welfare plan has 125 participants. It is part of a group insurance arrangement and its benefits and credits are paid in the same manner as the previous examples. A trade association acts as a conduit for payments and is the holder of the insurance contract. The plan appoints an officer of the participating employer as plan administrator. The plan administrator performs the same reporting and disclosure functions as the administrator in example (3), enlisting the help of the association in providing summary plan descriptions and necessary information. The exemption provided by 2520.104-21 does not apply.

[43 FR 10149. Mar. 10, 1978]

No. 86-256

Supreme Court, U.S.
FILED
OCT 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JOHN DOE,

Petitioner,

v.

A CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

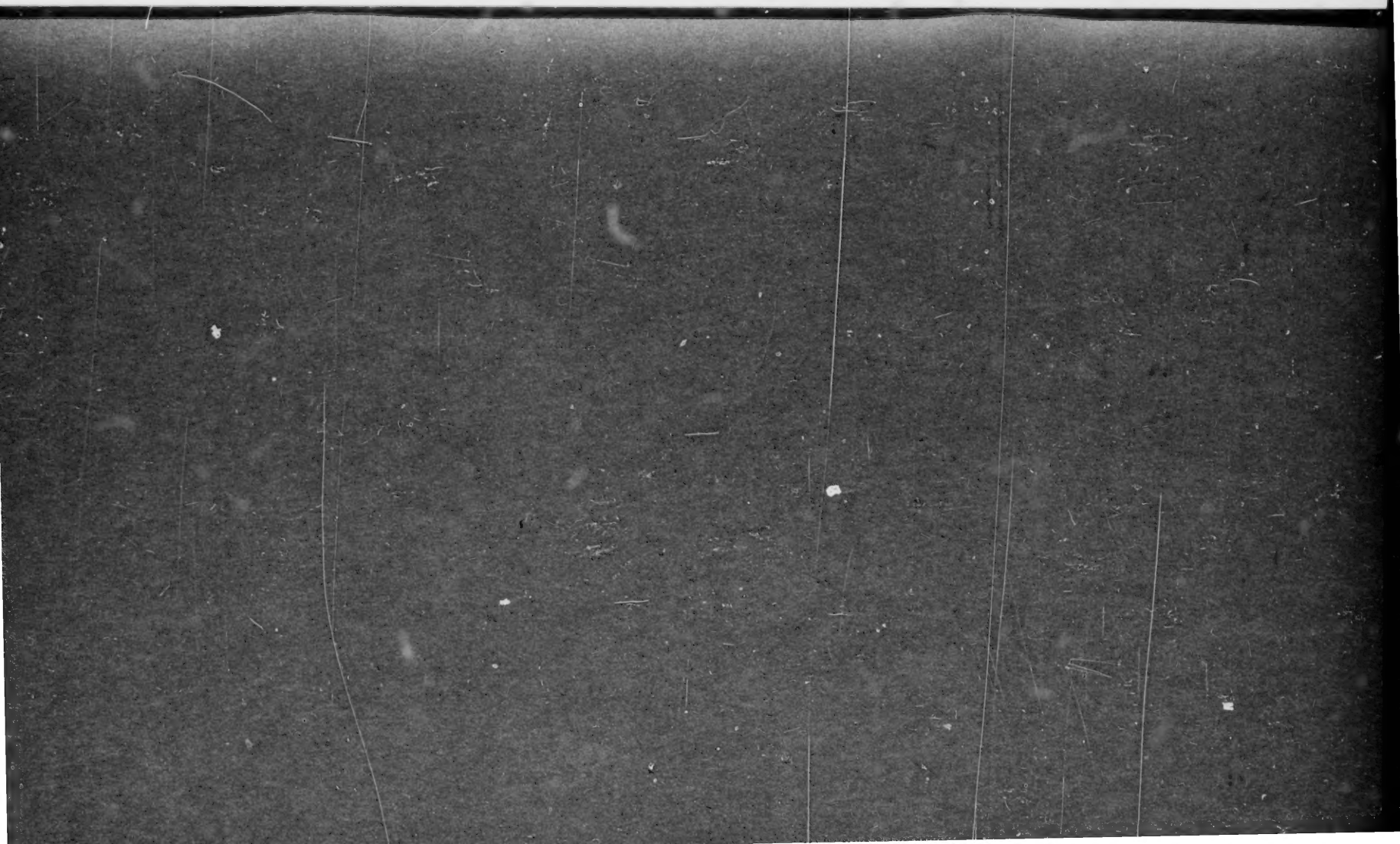
RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

D. STUART MEIKLEJOHN
125 Broad Street
New York, New York 10004
(212) 558-3665

Counsel for Respondents

Of Counsel:

ROY H. STEYER
DAVID G. FEHER
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000



Question Presented

Petitioner's nine questions reduced in the end to one: were the two cases that are the subject of the petition wrongly decided by the district court and the court of appeals. This is resolved by reference in both cases to the particular facts of petitioner's situation and to the complete absence of any legal basis for the claims asserted. Neither inquiry is worthy of the exercise of this Court's discretionary jurisdiction.

Petitioner brought suit against his former clients on the subject matters of his previous advice to them, and sought from the outset to assert claims on behalf of others, even after the district court and the court of appeals held that he could not do so. His claim in one case was dismissed by entry of summary judgment because (a) he was judicially estopped from pursuing his claim having sworn, in an affidavit submitted to the court that supervised his divorce proceedings, that the property he claimed in this action was his did not belong to him at a time when, under his claims in this action, it did; (b) his unclean hands barred his claims because his claims were inconsistent with legal advice he had previously given respondents and he had persistently flouted orders of the district court and the court of appeals; and (c) his claim had no legal basis. His claim in the other case was dismissed on grounds of mootness and unclean hands, and because the regulations on which he relied are inapplicable.

Statement Pursuant to Rule 28.1

The record in both cases has been sealed, on respondents' motion, to preserve the anonymity of the parties and protect the confidences that respondents imparted to petitioner, who was formerly their lawyer and who sued them on the subject matters on which he advised them. The information called for by Rule 28.1 has therefore respectfully been submitted separately, with a request that it be accepted under seal.

TABLE OF CONTENTS

	PAGE
I. Constitutional Provisions, Statutes, and Rules Involved	1
II. Statement of the Case	2
A. Petitioner's Legal Advice to Respondents	2
B. Petitioner's Pre-Litigation Threats	3
C. Petitioner's Complaints	3
D. The March 1982 Dismissals	5
E. The Court of Appeals Affirmance and Remand	6
F. Proceedings on Remand	6
G. The Dismissal of Petitioner's Individual Claims	7
H. The Court of Appeals Affirmance	10
III. Reasons for Denying the Petition	10
A. The Savings Plan Action (*Doe I*) Does Not Raise Any Substantial Question of Public Importance	10
1. Judicial Estoppel and Unclean Hands	11
2. The Legal Insufficiency of Petitioner's Claims	12
B. The Insurance Plan Action (*Doe II*) Does Not Raise Any Legal Question at All	14
IV. Conclusion	15
Appendix	1a

PAGE

TABLE OF AUTHORITIES

Cases

Doe v. *A Corporation*, 709 F.2d 1043 (5th Cir. 1983) 3, 5, 6, 10

Doe v. *A Corporation*, 788 F.2d 759 (5th Cir. 1986) 10

Doe v. *A Corporation*, No. H-81-396 (S.D. Tex. June 27, 1985) ..... *passim*

Doe v. *A Corporation*, No. H-81-397 (S.D. Tex. December 10, 1984) ..... *passim*

Swaida v. *IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd per curiam*, 728 F.2d 159 (2d Cir.), *cert. denied*, 469 U.S. 874 (1984) ... 12-13

Statutes, Rules, and Regulations

29 U.S.C. § 1001, *et seq.* 1

29 U.S.C. § 1144(a) 11

26 C.F.R. § 1.410(a)-7(a)(1)(ii) 1

26 C.F.R. § 1.410(a)-7(d)(1)(i)-(ii) 1, 13

29 C.F.R. § 2520.104-20 14

29 C.F.R. § 2520.104-20(a) 14

29 C.F.R. § 2520.104-20(b)(3)(iii) 14

29 C.F.R. § 2520.104-21(a) 14

Fed. R. Civ. P. 56 2

IN THE

Supreme Court of the United States

October Term, 1986

No. 86-256

JOHN DOE,

Petitioner,

v.

A CORPORATION, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION

I.

Constitutional Provisions, Statutes and Rules Involved

Many of the provisions that petitioner cites are irrelevant to these actions. The elapsed time regulations promulgated by the Department of the Treasury under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 *et seq.* ("ERISA"), which appear at 26 C.F.R. § 1.410(a)-7(a)(1)(ii) and § 1.410 (a)-7(d)(1)(i)-(ii) (1982), are relevant, but are not cited by petitioner. They are appended following this brief.

II.

Statement of the Case

Petitioner seeks review of the affirmance by the Court of Appeals for the Fifth Circuit of the entry of summary judgment by the United States District Court for the Southern District of Texas (Honorable James DeAnda, D.J.), pursuant to Fed. R. Civ. P. 56, dismissing two actions brought by petitioner against his former clients, A Corporation and A Pension and Welfare Benefit Plan ("Benefit Plan").[1]

A. Petitioner's Legal Advice to Respondents

Petitioner was employed by respondents as an attorney from May 27, 1975 to March 31, 1980, when he elected to leave and accept employment with another company. During much of this four year and ten month period, he provided legal advice to respondents' personnel on subject matters directly and substantially related to those on which he based his claims in these lawsuits. Petitioner consulted with and rendered advice to respondents' personnel on matters arising under the statutes on which he purported to base his suits, and had full access to respondents' files on such matters. As petitioner said in an affidavit filed in both actions in May 1981, his duties as legal counsel to the Plan required him to study and become familiar with all the Plan documents.

While he was employed by respondents, petitioner rendered legal opinions annually, for the benefit of the Plan's

---

[1] The pseudonyms were placed in the style of the cases at respondents' request, as a part of the sealing of the record. Respondents will refer to the parties by those pseudonyms as well as their positions on this petition. In one of the cases, petitioner also sued the party designated in the caption as An Insurance Company, but none of the questions petitioner presents to this Court concerns his claim against that party.

auditors, on whether the Plan and the administration of the Plan complied with ERISA. In all such opinions, petitioner stated that the Plan and administration of the Plan complied with ERISA and other applicable laws. The Plan "administration" covered by these opinions included the vesting provisions of the savings feature of the Benefit Plan.

B. Petitioner's Pre-Litigation Threats

After leaving respondents employ, but before filing suit, petitioner demanded payment to him of benefits he said were owed to him. When payment was refused, petitioner threatened suit, on behalf of himself and a purported class, if respondents did not pay him what he said he was owed, make "restitution" to the purported class, and pay petitioner a "contingent attorney fee" equal to ten percent of a "fund" that petitioner claimed was worth "millions." Respondents did not pay, but instead reminded petitioner that he should consider the ethical obligations he owed to his former clients. He told them they should not be "naive," and reiterated his threat to bring suit. When no payment was forthcoming, petitioner filed both actions. *See Doe* v. *A Corporation*, 709 F.2d 1043, 1049-1050 (5th Cir. 1983); *see also Doe* v. *A Corporation*, No. H-81-396 (S.D. Tex. June 27, 1985) (*"Doe II"*), Petition at 5a-6a.

C. Petitioner's Complaints

Petitioner filed complaints in both actions in February 1981. One complaint (the "Savings Plan" Action) (*Doe I*) alleged claims with respect to the use and disclosure of the credited service rules in the Benefit Plan that determine when an employee's right to the employer contributions to his or her Savings Plan vests. The Savings Plan is a savings feature of the Benefit Plan that permits an employee to ask for withholding and investment of a percentage of salary; the employer matches that contribution, up to stated percentages. The Benefit Plan requires five calendar years of

service before the employee's right to the employer matching contribution vests. Petitioner worked at A Corporation for four years and ten months. He claimed, however, that under ERISA and regulations thereunder, the Benefit Plan was required to give him credit for a full fifth year of service, because (he said) he worked more than 1,000 hours in his fifth year. This claim was based, alternatively, on the arguments that (i) the statute requires one year of credit for 1,000 hours, and the "elapsed time" regulations promulgated under ERISA by the Department of the Treasury, which permit benefit plans to count vesting service by calendar years rather than 1,000 hour "years", are invalid, or (ii) the Benefit Plan was not drafted in terms that permit it to rely on the elapsed time regulations and has not historically used the elapsed time method of calculating vesting service. *See Doe* v. *A Corporation,* No. H-81-397 (S.D. Tex. December 10, 1984) (*"Doe I"*) Petition at 12a, 18a-21a.

The other complaint (the "Insurance Plan" Action) (*Doe II*) alleged claims concerning the contributory group life insurance feature of the Benefit Plan. Petitioner alleged that certain dividends and retroactive rate refunds paid to A Corporation by the insurance carrier that provides coverage for, among other things, the contributory group life insurance feature of the Benefit Plan, should not have been retained by A Corporation as public reports filed by the Benefit Plan showed they were, but should instead have been paid to himself (and other plan participants). Petitioner claimed a right to recover the portion of the premium payments that he said was attributable to the dividends. *See Doe II,* Petition 4a, 6a-7a.[2]

---

[2] Petitioner also asserted claims based on respondents' disclosures of the life insurance conversion options available to a departing

(footnote continued on following page)

Petitioner sued in both actions on behalf of himself and a purported class. He signed the complaints as co-counsel, and sought not only broad equitable relief and damages for the individual members of the alleged class, but also special awards to himself personally "in excess of $300,000" in the Savings Plan Action and one-third of any recovery awarded the purported class in the Insurance Plan Action, treble damages (claimed to be provided by statute) in the Savings Plan Action, and a "reasonable attorney's fee" in both actions, to be calculated in the Insurance Plan Action as a percentage of the "class" recovery. *See Doe,* 709 F.2d at 1045.

A Corporation and the Benefit Plan denied all substantive allegations, alleged several affirmative defenses, and counterclaimed for injunctive relief based on petitioner's disability to pursue either action in any capacity because of his former attorney-client relationships with them.

D. The March 1982 Dismissals

On March 30, 1982, the district court granted motions by respondents for summary judgment and dismissed petitioner's complaints with prejudice as to petitioner but without prejudice to any present or former employee of A Corporation, granted respondents the injunctive relief they sought, and sealed the record. The March 1982 judgments followed a year of litigation in which (1) there was extensive document and other discovery and an evidentiary hearing, (2) petitioner moved (in the Savings Plan Action) for summary judgment on his own behalf (though not that

---

(footnote continued from preceding page)

employee. The district court dismissed those claims because petitioner knew, from his years of providing legal advice to respondents about the Plan, that the Plan did not offer the conversion option he claimed in the Insurance Plan Action. *Doe II,* Petition at 4a-5a. Petitioner has not raised the issue in this Court.

of his purported class), and (3) all parties submitted affidavit and documentary evidence on respondents' motions for summary judgment and fully briefed all relevant issues.

The March 30, 1982 dismissals were based on the irrebuttable presumption—created by the substantial relationship between the subject matter of the actions and of petitioner's previous legal advice to A Corporation and the Benefit Plan—that petitioner would, in prosecuting the actions, use his former client's confidences to his own advantage and their disadvantage, in violation of ethical Canons. *See Doe,* 709 F.2d at 1045.

E. The Court of Appeals Affirmance and Remand

On July 22, 1983 the court of appeals affirmed the dismissal of the complaints with respect to the class claims, but held that petitioner was not precluded from pursuing his individual claims solely by virtue of his status as respondents' former counsel, and remanded the case for further proceedings. *Doe,* 709 F.2d at 1048, 1050-51.

F. Proceedings on Remand

Respondents moved on remand for a permanent injunction against disclosures of respondents' confidences by petitioner and his counsel, to ensure that there would be no doubt about the existence of the obligation to maintain confidentiality. Petitioner opposed entry of such an order, arguing that prosecution of his individual claims made it necessary for him to speak about the Benefit Plan with the Department of Labor and others, and that an injunction would somehow impede discovery. The district court granted respondents' motion.

In addition, the district court, emphasizing that under the court of appeals decision petitioner could not sue on behalf of anyone other than himself, entered an order

directing petitioner to amend his pleadings to delete references to others, so that the nature and amount of his individual claims would be clear. Petitioner delayed in amending his complaints, and once he did so, he included all the items that had rendered the original complaints objectionable: references to persons other than petitioner and assertions that petitioner sued on behalf of others as well as himself, claims for benefits under the A Corporation annuity plan (when petitioner admitted that he himself had no such claim), a request for an accounting (when petitioner's damages would be readily ascertainable), and express prayers for relief on behalf of persons other than petitioner. Respondents' motions to strike these pleadings, as inconsistent with the mandate of the court of appeals, were granted. Further amended complaints were filed and answered in November and December 1984. *See Doe I,* Petition at 16a, and *Doe II,* Petition at 8a.

The parties conducted additional discovery in the Savings Plan Action in July and August 1984. At his deposition on July 27, petitioner testified, among other things, that (1) in an affidavit he filed with a Texas court in 1979, at a time when, according to his claim in the Savings Plan Action, the employer contributions to his savings account were vested, he swore that those contributions were *not* vested (and were therefore not available to be divided with his wife as community property), and (2) he knew that the Plan was administered in accordance with the elapsed time regulations when he advised respondents that the Plan was administered in accordance with ERISA. *See Doe I,* Petition at 13a-15a.

G. The Dismissal of Petitioner's Individual Claims

On August 20, 1984 petitioner renewed his motion for summary judgment in the Savings Plan Action. Respond-

ents filed a cross-motion for summary judgment on October 9, 1984.

By memorandum and order dated December 10, 1984 the district court granted respondents' cross-motion for summary judgment, denied petitioner's motion, and entered judgment for the respondents.

First, the district court held that the doctrine of judicial estoppel foreclosed petitioner from claiming that the employer contributions to his Savings Plan account were vested, because that claim was flatly inconsistent with his prior sworn statements to the Texas court that adjudicated his 1979 divorce proceeding. *Doe I*, Petition at 12a-14a.

Second, the district court concluded that petitioner's claims were barred by the doctrine of unclean hands. "The totality of [petitioner's] behavior in this case illustrates a saga of deceit, dishonesty, and vexatiousness in the discovery process, and a total disregard for the attorney-client relationship." *Doe I*, Petition at 14a-18a.

Third, the district court held that in any event the substantive law of ERISA and the terms of the Benefit Plan were contrary to petitioner's claims that the employer Savings Plan contributions were vested. The Benefit Plan provided, as ERISA permitted and as petitioner, a lawyer familiar with the terms of the Plan, knew, that petitioner had to work at A Corporation for five calendar years before his right to those contributions vested, and it was undisputed that he worked there fewer than five calendar years. *Doe I*, Petition at 18a-21a.

On January 31, 1985, respondents moved the district court for summary judgment in the Insurance Plan Action. They did so on three grounds: petitioner's claims were without merit; petitioner's unclean hands barred his claims;

and mootness. The mootness argument stemmed from A Corporation's and the Benefit Plan's offer to allow judgment to be taken against them in the full amount ($1,247.63) of the premiums petitioner paid for contributory life insurance coverage while he was employed by A Corporation as a lawyer. The offer was made solely for the purpose of avoiding the expense and effort associated with taking the action to trial. *See Doe II*, Petition at 7a.

Petitioner said, in a response filed with the district court, that he would accept the amount offered subject to (i) his application to the Court for attorneys' fees and costs; (ii) dismissal with prejudice of the respondents' "cross-action;" (iii) "cessation of all adverse employment recommendations" by respondents' employees and agents; (iv) an agreement by respondents not to file "any professional grievance" against petitioner; and (v) an agreement by the "fiduciaries of the Benefit Plan" to make "restitution without public sanctions" under the regulations petitioner had cited in support of his "dividend" claims.

By Memorandum and Order dated June 27, 1985 the district court granted respondents' motion for summary judgment.

First, the district court held that petitioner could not claim injunctive or declaratory relief because he was no longer a participant in the Plan and had no personal cognizable legal interest in the present or future administration of the Plan. *Doe II*, Petition at 8a-9a.

Second the district court concluded that petitioner's individual damages—which were, as the court of appeals had previously affirmed, all he could claim a right to recover —consisted of no more than his claim to his share of the alleged dividend. Petitioner was not entitled to an accounting because his share of any refund that might be owed

to him was readily ascertainable and "the only other apparent purpose for such an accounting would be to improperly obtain information concerning the purported claims of other Plan participants." *Id.*

Third, the district court held that the offer of judgment by respondents A Corporation and Benefit Plan in the full amount of his total premium payments mooted petitioner's claim for compensatory damages equal to the portion of those payments characterizable as "dividends." *Id.*

Fourth, as an "alternative basis" the district court held that respondents were entitled to judgment on the grounds of petitioner's "bad faith and unclean hands." *Doe II*, Petition at 9a. The district court noted that petitioner's misconduct was evidenced by the totality of the record in both actions and explicitly found that petitioner had "'attempted either to mulct or blackmail A Corporation.'" *Id.* (quoting *Doe*, 709 F.2d at 1050).

H. The Court of Appeals Affirmance

The cases were consolidated for purposes of appeal. Both were affirmed by the Court of Appeals for the Fifth Circuit, without opinion, citing Rule 47.6 of the Rules of that court. 788 F.2d 759 (5th Cir. 1986). The mandate issued June 2, 1986.

III.

Reasons for Denying the Petition

A. The Savings Plan Action *(Doe I)* Does Not Raise Any Substantial Question of Public Importance.

The district court dismissed this action on three grounds: judicial estoppel; unclean hands; and the legal insufficiency of petitioner's claims. Petitioner claims there was error in

the decision, affirmed by the court of appeals, in that (i) the application of the doctrines of judicial estoppel and unclean hands in an ERISA case was allegedly inconsistent with holdings of other courts of appeals (Petition Pt. 3 at 30-32); and (ii) petitioner's claim that he was entitled to the employer contributions to his savings account was a sound legal claim (Petition Pts. 1 and 2 at 25-29 and 29-30).

1. *Judicial Estoppel and Unclean Hands*

Petitioner does not challenge the district court's holding that there were grounds to invoke these doctrines, and there is no basis for any such challenge. Petitioner's claims were inconsistent with his prior sworn statements to another court, and before and during the lawsuit, he demonstrated contempt for the ethical obligations he owed to his former clients and to his duty, as an officer of the court, to abide by its rulings.

Petitioner argues instead that the supersedure clause in ERISA, 29 U.S.C. § 1144(a), must be read to prohibit a district court from applying such doctrines to ERISA claims. Petitioner claims that other courts of appeals have held that under ERISA's preemption clause such doctrines cannot be applied to ERISA claims.

Petitioner's argument is absurd, and the supposed conflict among the circuits does not exist. What the district court did was to apply judicial rules of general application to petitioner's conduct, and bar his claims when, measured by those rules, his conduct was found wanting. One of the rules is that a litigant cannot make claims that contradict earlier sworn statements the litigant has made to another court. This serves the salutary purpose of inhibiting the urging of falsehoods on courts. *See Doe I*, Petition at 12a-14a. The other rule is that there are limits to the

extent to which a court will allow claims by a lawyer against his former clients when the claims contradict advice the lawyer gave the clients, and when the lawyer has attempted to blackmail the clients before suit was filed and has persisted in the litigation in efforts to inflate his own claims in an effort to put pressure on the defendants to settle. *See Doe I*, Petition at 14a-18a.

No court has held anything that is inconsistent with the district court's holdings. ERISA plaintiffs, like all other plaintiffs, are subject to rules of general application governing the conduct of judicial proceedings. ERISA preempts state laws that contain substantive provisions on pension and welfare benefit matters. But ERISA does not immunize ERISA plaintiffs from rules that constrain their behavior as litigants, any more than it immunizes them from any other form of disability to sue, such as releases they give, which are in the form of contracts made under state law.

2. *The Legal Insufficiency of Petitioner's Claims*

Even if the significance of petitioner's elapsed time arguments were not diminished in this case by the existence of other grounds for dismissal, the arguments would be an insufficient basis for granting a writ of certiorari. Petitioner claimed that the elapsed time regulations were invalid, that the Benefit Plan was drafted in such a way that it could not take advantage of them, and that the Plan did not in fact use the elapsed time method.

a. *The Elapsed Time Regulations*

Although the petition fails to acknowledge it, this Court has previously denied a petition for a writ of certiorari in a case that raised squarely the issue of the validity of the elapsed time regulations. *Swaida* v. *IBM Retirement Plan*, 570 F. Supp. 482 (S.D.N.Y. 1983), *aff'd per curiam*, 728

F.2d 159 (2d Cir.), *cert. denied*, 469 U.S. 874 (1984), held that the elapsed time regulations were a valid exercise of the rulemaking authority delegated to the Departments of Labor and the Treasury The plaintiff therefore erred in arguing that pension plans could not require that an employee work a full calendar year to get a year's credit for vesting purposes.

b. *The Text of the Benefit Plan*

Petitioner also argued that the Benefit Plan was not properly drafted to take advantage of the elapsed time regulations because it uses the term "year of service" rather than the term "period of service" to describe the length of time an employee must work to get a year's credit for vesting purposes. This issue is hardly of public importance, inasmuch as it involves the drafting of the vesting provisions of one benefit plan. And the district court properly characterized petitioner's argument as "nonsense, both linguistically and legally." (*Doe I*, Petition at 21a). The elapsed time regulations use the term "year of service" interchangeably with "period of service," (*see, e.g.*, 26 C.F.R. § 1.410(a)-7(d)(1)(i)), presumably because a year of service *is* a period of service.

c. *The Benefit Plan's Use of Elapsed Time*

Finally, petitioner's argument that in fact the Benefit Plan did use the 1,000 hour rule is a total fabrication, as the district court found. *Doe I*, Petition at 21a. As petitioner knew from many years of rendering legal advice to his clients on Benefit Plan matters, the Plan has always used elapsed time. The way in which it filled out the Form EBS-1, on which petitioner places so much weight, is, as the district court found, of no relevance whatever to petitioner's individual claims. The form sought information, in the early stages of administration of the statute, about various aspects of benefit plan administration. It was not

known at the time whether there would be any elapsed time regulations, and the form called only for a number of hours required for a year of service credit; A Corporation, which uses a 1,000 hour rule for seasonal employees, therefore filled in "1,000" as the number of hours. How petitioner thinks this helps him is not clear, but it does not. As he knew from the text of the plan, the Benefit Plan uses and has always used elapsed time to compute vesting service.

B. The Insurance Plan Action *(Doe II)* Does Not Raise Any Legal Question at All.

As with the Savings Plan Action, the Insurance Plan Action was dismissed on grounds in addition to the meritless nature of petitioner's legal claims. But the only question petitioner presents to this Court is whether his claims are sound. They are not.

Petitioner claimed that A Corporation owed a refund of dividends that it had received from the insurance carrier. As the public reports filed by A Corporation make clear, the dividends were received on account of a group of insurance plans that included not only the plan to which petitioner and other A Corporation employees contributed but also plans for which A Corporation paid the full amount of the premium. It was therefore not possible to say that the refunds were attributable to contributions by petitioner or other plan participants (and in fact they were not). More significantly, the legal basis on which petitioner proceeded was simply inapplicable. He cited regulations that confer on certain small plans an exemption from disclosure requirements if those plans choose to return certain dividends to plan participants. *See* 29 C.F.R. §§ 2520.104-20, 104-20(a), 104-20(b)(3)(iii) and 104-21(a). The Benefit Plan is too big to fit within the regulations, and has never sought such an exemption. Petitioner pointed to no other source of the alleged obligation to pay over the dividends, and none exists.

IV.

Conclusion

These cases should never have been brought. They were from their inception egregious examples of a lawyer trying to browbeat his former clients into paying him off based on imaginary claims in areas of the law in which petitioner had done legal work for them and had given them legal advice that, like a sworn statement he had made to another court, was inconsistent with his claims in these actions. The petition should be denied.

Respectfully submitted,

D. STUART MEIKLEJOHN
125 Broad Street
New York, New York 10004
(212) 558-3665

Counsel for Respondents

Of Counsel:
ROY H. STEYER
DAVID G. FEHER
SULLIVAN & CROMWELL
125 Broad Street
New York, New York 10004
(212) 558-4000

October 14, 1986

Appendix

26 C.F.R. § 1.410(a)-7(a)(1)(ii) provides:

> (ii) Under the alternative method set forth in this section, by contrast, an employee's statutory entitlement with respect to eligibility to participate, vesting and benefit accrual is not based upon the actual completion of a specified number of hours of service during a 12-consecutive-month period. Instead, such entitlement is determined generally with reference to the total period of time which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer or employers maintaining the plan. The alternative method set forth in this section is designed to enable a plan to lessen the administrative burdens associated with the maintenance of records of an employee's hours of service by permitting each employee to be credited with his or her total period of service with the employer or employers maintaining the plan, irrespective of the actual hours of service completed in any 12-consecutive-month period.

26 C.F.R. § 1.410(a)-7(d)(1)(i)-(ii) provides:

> (d) *Vesting*-(1) *General rule.* (i) For purposes of section 411(a)(2), relating to vesting in accrued benefits derived from employer contributions, a plan which determines service to be taken in account on the basis of elapsed time shall provide that an employee is credited with a number of years of service equal to at least the number of whole years of the employee's period of service, whether or not such periods of service were completed consecutively.

Appendix

(ii) In order to determine the number of whole years of an employee's period of service, a plan shall provide that non-successive periods of service must be aggregated and that less than whole year periods of service (whether or not consecutive) must be aggregated on the basis that 12 months of service (30 days are deemed to be a month in the case of the aggregation of fractional months) or 365 days of service equal a whole year of service.